Supreme Court, U.S.
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NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

RICHARD ROCKWOOD,

Petitioner,

v.

BRIAN O'CONNELL and SHARON HILL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT DIVISION SIX

Patricia J. Barry
25835 Narbonne Ave., Ste 235
Lomita, California 90717
(310) 534-0093
Attorney for Petitioner RICHARD ROCKWOOD

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48 pp

QUESTION PRESENTED

1. May a state court ignore all federal precedent and hold that a public employee is barred from presenting evidence of a five-year hostile work environment leading to his constructive termination in a 42 U.S.C. Section 1983 ("Sec.1983") case, involving violations of free speech under the First Amendment, because of the statute of limitations, which, for Section 1983 cases, is one year in California?

LIST OF PARTIES

Richard Rockwood, Petitioner and Plaintiff-Appellant below. Sharon Hill and Brian O'Connell, Respondent and Defendants-Respondents below.[1]

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[1] The following parties were either dismissed at the trial level by Plaintiff or by summary judgment, or at the appellate level by the Court of Appeal in Mr. Rockwood's first appeal from a judgment sustaining a demurrer to his Second Amended Complaint with no leave to amend.

They are as follows: County of Santa Barbara, David Yeager, Robert Kallman, William Wallace, Dewayne Holmdahl, Toru Miyoshi, Leland Steward, William G. Menchen, Harold Purdy, Edward J. Marini, Charles F. Wagner, Ronald M. Gilman, Steven Schinnerer, Kenneth L. Nelson, David Elbaum, Frank Hawthorne, Walt Rosebrock, and Carl Hehnke. Only Mrs. Hill and Mr. O'Connell remained in the lawsuit when Mr. Rockwood went to trial in July and August 1992, and they were the defendants named in the second appeal to which judgment Mr. Rockwood seeks certiorari.

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Petitioner, RICHARD ROCKWOOD, petitions for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Six to review

the order filed April 7, 1994, in Rockwood v. O'Connell, et al., No. 2d Civ. B070981. Appendix ("App.") 001-020.

OPINIONS BELOW

Santa Barbara County Superior Court Judge Bruce Dodds granted Defendants Brian O'Connell and Sharon Hill's joint Motion for Nonsuit (and possibly, for Directed Verdict) at trial on August 11, 1992. Judge Dodds' rulings on the motions are reproduced in the attached Appendix at 24-28.

The judgment based on the nonsuit was filed on August 26, 1992, and is found in the Appendix at 29-30.

The opinion by the Court of Appeal affirming the judgment based on the nonsuit was filed on April 7, 1994, and is found in the Appendix at 001-020. It is this opinion to which Mr. Rockwood seeks

the Writ of Certiorari.

The order by the Court of Appeal denying Mr. Rockwood's Petition for Rehearing was filed on May 2, 1994, and is found in the Appendix at 23.

The order by the Supreme Court of California denying Mr. Rockwood's Petition for Review was filed on June 22, 1994, and is found in the Appendix at 22. The Supreme Court is the court of last resort in California, and the review sought was discretionary. This Petition is timely, having been filed within ninety days of the denial of review. Rules 13.1, 29, U.S. Supreme Court Rules.

The opinion by the Court of Appeal reversing the judgment based on the sustaining of the demurrer was filed on July 27, 1990, and is found in the Appendix at 31-48.

The amended nunc pro tunc order denying Defendants O'Connell and Hill's Motion for Summary Judgment was filed on November 18, 1991, and is found in the Appendix at 50-51.

The order denying Defendants O'Connell and Hill's Petition for Writ of Mandate by the Court of Appeal was filed on November 21, 1991, and is found in the Appendix at 52.

The order denying Defendants O'Connell and Hill's second Motion for Summary Judgment was filed on June 22, 1992, and is found in the Appendix at 53-54.

Mr. Rockwood's Second Amended Complaint was filed on June 22, 1992, and is found in the Appendix at 55 - 79.

JURISDICTION

This Court's jurisdiction is invoked

pursuant to 28 U.S.C. Sec._____.

The judgment of the California Court of Appeal sought to be reviewed was entered on April 7, 1994. Denial of discretionary review of that judgment by the Supreme Court of California, California's court of last resort, was filed on June 22, 1994.

This Petition is timely, having been filed within ninety days of the denial of discretionary review. Rules 13.1, 29, U.S. Supreme Court Rules.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Free Speech Clause of the First Amendment of the United States Constitution states as follows:

> "Congress shall make no law...abridging the freedom of speech,..."

Sec.1983 states as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

STATEMENT OF THE CASE

A. <u>The Federal Question</u>. The federal question has always been present since this is a Sec.1983 case alleging

violations of the U. S. Constitution, with the one remaining claim in the action based on the Free Speech Clause of the First Amendment of the United States Constitution. See Second Amended Complaint, App. 55 - 79.

B. Introduction.

> "A single photograph of two sumo wrestlers engaged in combat may give the impression they are dancing a pas de deux. One must witness the entire match to appreciate its meaning and significance." Justice Gilbert writing for the Court in Accardi v. Superior Court (1993) 17 Cal.App.4th 341, 350.

Despite Justice Gilbert writing this imaginative metaphor in a case where he and his fellow justices ruled that the one-year statute of limitations in cases

alleging violations of California's Fair Employment and Housing Act ("FEHA") did not limit Ms. Accardi's right to present evidence of an eleven-year hostile work environment based on sexual discrimination and retaliation, Justice Stone turned the Accardi ruling on its head in the instant case, holding that the California one-year statute of limitations in Sec.1983 cases [2] limited Mr. Rockwood's attempt to present a five-year campaign of retaliation and harassment based on his exercise of free speech rights to the one year preceding the filing of the action.

Because of this severe limitation on the evidence, the remaining two defendants in the case, Sharon Hill, Assistant

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[2] This Court held in Wilson v. Garcia, 471 U.S. 261 (1985) that the statute of limitations applicable to Sec. 1983 actions is the one for personal injury of the state where the Sec. 1983 action is brought.

Director of Department of General Services, Santa Barbara County and Mr. Rockwood's immediate supervisor, and Mr. Brian O'Connell, Director of Department of General Services, Santa Barbara County and Mr. Rockwood's second-line supervisor, may appear to be dancing a "pas de deux" in a ballet when in fact they are two wrestlers pinning Mr. Rockwood to the ground.

The Court ignored the arguments of the prestigious amici, American Civil Liberties Union of Southern California, National Whistleblowers' Center, and California Employment Lawyers' Association, all urging reversal of the nonsuit.

In Accardi, supra, Justice Gilbert relied on federal precedent, primarily Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), in support of its holding that

Ms. Accardi could maintain a claim for eleven years of harassment and discrimination. Accardi, supra, 17 Cal.App.4th at 346, 347, 348, 349, 350, 352. He also relied on San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, a sexual harassment case brought under the FEHA statute. Fisher, like Accardi, heavily relied on federal precedent. In both of these cases, Mr. Rockwood's attorney represented the plaintiff.

In Meritor, this Court examined Ms. Vinson's entire four-year work history without regard for the limitations period.

This makes good sense, since as pointed out by Justice Gilbert in Accardi, supra, 17 Cal.App.4th at 350:

"A view of the events from beginning to end enables the trier of fact to

see their relationship to one another, and consequently their meaning and significance....The department's actions concerning Accardi during the years 1989 through 1991, if viewed as solitary events, could be nondiscriminatory, and therefore legitimate. A seemingly nondiscriminatory reason for an employment decision, may be a pretext for what in fact is a discriminatory reason for the employer's decision." Emphasis added.

Even the California Supreme Court -- from whom Mr. Rockwood sought discretionary review -- ruled in a state age discrimination and common-law tort case, Turner v. Anheuser-Busch, 94 Daily Journal D.A.R. 10373, 10375, No.S.029985 (July 25, 1994), 7 Cal.4th 1238, (like the

Court of Appeal in Accardi, heavily relying on federal precedent), that

> "Although we agree... that there is an 'outer limit' beyond which an employee cannot remain on the job after intolerable conditions arise and still claim constructive discharge, reliance on the applicable limitations period to define that limit is unduly arbitrary." Emphasis added.

It took some years to convince trial courts that sexual harassment is not about sex, but rather about tyranny and abuse of power.

So, retaliation against a male employee because he engaged in free speech is not about reasonable business actions by supervisors but about tyranny and abuse of power. And as the child is the father

of the man, (as Woodsworth wrote), so, past acts are the ancestors of today's and tomorrow's decisions.

By its ruling, the Court did not permit the full picture of what O'Connell and Hill were doing to Rockwood between May 1984 and August 1986, and certainly, not the "childhood" of Hill's and O'Connell's relationship with Rockwood.

By the Court's ruling, no plaintiff alleging a Sec.1983 continuing violation claim could file one year after being constructively terminated. If Mr. Rockwood had waited until June 1988, which was one year after being constructively terminated, he could not have presented <u>any</u> evidence of the hostile work environment, only the evidence that he left his employment.

The Court's ruling effectively bars

constructive termination/hostile work environment/continuing violation cases from being brought under Sec.1983. Yet, as we have demonstrated, and will further demonstrate, federal precedent permits introduction of hostile and retaliatory acts which occur outside the statute of limitations.

It is also abundantly clear that a public employee may allege a constructive termination in Sec.1983 cases brought under the Free Speech Clause of the First Amendment.

See, for example, Clark v. Yosemite Community College Dist., 785 F.2d 781 (9th Cir. 1986); Reussow v. Eddington, 483 F.Supp. 739, 740 (D. Colo. 1980). Cf. Young v. Southwestern Savings & Loans Ass'n, 509 F.2d 140, 144 (5th Cir. 1975).

Finally, we note that by the Court's

ruling, plaintiffs' ability to present all the evidence of their hostile work environment in constructive termination cases brought under Sec.1983 will vary, depending on what state she lives in and that state's personal injury statute of limitations. Thus, this Court should grant certiorari in order to correct the error of the state court.

C. **Procedural History of Case.**

On August 10, 1987, Mr. Rockwood and his wife, Barbara Rockwood filed a complaint for damages and declaratory and injunctive relief. They sued the County of Santa Barbara, members of the Board of Supervisors, two members of the Grand Jury, various County employees and officials, including Mr. Rockwood's two former supervisors, Brian O'Connell, Director of the Department of General

Services ("DGS") and one of his two assistants, Sharon Hill.

Mr. Rockwood alleged he was a former employee of Santa Barbara County working as an Equipment Superintendent and then as a Vehicle Specialist (in DGS) from December 1980 to June 1987. He alleged he was subjected to a deliberate course of retaliatory conduct in his employment for five years, leading to his termination to punish him for speaking out against corruption and for attempting to initiate reform to eliminate the corruption in his department. He alleged violations of his First, Fifth and Fourteenth Amendments under Sec. 1983 in the First Cause of Action and violations of Article I, Sections 1, 2, 7, and 13, California Constitution in his Second Cause of Action.

In the third cause of action, Barbara Rockwood asserted a loss of consortium applicable to all the defendants.

Mr. Rockwood filed his second amended complaint on November 4, 1988. App.55 - 79. Mrs. Rockwood was no longer a Plaintiff. Mr. Rockwood sued the same individuals as in the first complaint, except the Grand Jury members and three of his former supervisors, who he dismissed from the lawsuit.

With some changes, Mr. Rockwood asserted the same facts and claims as alleged in his other two complaints, but eliminated the procedural due process and the Article I, Section 13, California Constitution claims.

Defendants filed three demurrers all of which were sustained by the Court. The Court sustained the third demurrer (to the

second amended complaint, App. 55-79), without leave to amend in a memorandum of intended decision filed on March 29, 1989.

Plaintiff filed a notice of appeal on June 5. On July 27, 1990, the Court of Appeal, Second Appellate District, Division Six, filed an opinion which partially affirmed and partially reversed the judgment of dismissal. APP.001-020.

This Court stated as follows:

> "....[T]he complaint alleges that job supervisors William Menchen, Charles Wagner, Brian O'Connell and Sharon Hill recommended that Rockwood's job category be eliminated in retaliation for the exercise of his right of free speech. That is sufficient to state a cause of action as to those

defendants." APP. 0042.

On June 13, 1991, Defendants filed a Motion for Summary Judgment ("MSJ") on behalf of Defendant Charles Wagner. Mr. Rockwood opposed the motion in writing. On August 5, 1991, the Court entered an order giving summary judgment to Mr. Wagner.

On August 1, Defendants moved for summary judgment on behalf of William Menchen. On August 20, Plaintiff filed his opposition. On September 12, the Court granted summary judgment to Mr. Menchen.

On September 24, Defendants Brian O'Connell and Sharon Hill filed two MSJ's. On October 11, Plaintiff filed his opposition to them. On November 18, 1991, the Court denied the motion in its entirety. APP. 0052.

On November 14, Defendants Hill and

O'Connell petitioned the Court of Appeal, for a writ of mandate concerning the denial of the MSJ. On November 21, the Court denied the petition. APP. 0052.

On November 8, 1991, the law firm of Staton and Tardiff entered its appearance on behalf of Sharon Hill.

On May 1, 1992, Mr. Tardiff served a second MSJ on behalf of Mr. O'Connell and Ms. Hill. On May 15, Mr. Rockwood filed his opposition. On June 22, 1992, the Court denied the motion. APP. 0053-0054.

After several continuances, the parties appeared on July 1, 1992, for trial, and the presiding judge, Judge Ronald Stevens, assigned the case to Judge Bruce Dodds. Mr. Tardiff filed 22 motions in limine on behalf of both Defendants.

On July 2, the parties appeared for argument on the motions in limine. Almost

all the motions in limine brought by Defendants were granted. On August 3, Plaintiff's one motion in limine was granted without opposition from opposing counsel.

On July 6, the parties appeared for trial at which time Plaintiff's counsel served a statement of disqualification on Judge Dodds. Judge Dodds had himself sworn in so that he could provide a sworn response to the statement.

The statement of disqualification was referred to Judge Randall, Kern County. On July 28, 1992, Judge Randall denied the statement of disqualification.

Jury trial commenced on August 3 through August 6, began again on August 10, and concluded on August 11. On August 11, the court granted Defendants' motions for nonsuit, and possibly for directed

verdict. App.26, lines4-7; App.28:21-28.[3]

On August 26, 1992, judgment was entered for Defendants. APP. 29-30. On September 23, 1992, Mr. Rockwood filed notice of intention to move for new trial.

On October 9, Defendants Hill and O'Connell filed a memorandum for costs. On October 26, Mr. Rockwood filed a motion to tax costs. On October 8, Defendants filed a motion for attorney's fees. On October 26, Mr. Rockwood filed his opposition to the motion and a timely notice of appeal from the judgment entered

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[3] Mr. Tardiff prepared the judgment and in that judgment he indicated that Plaintiff rested on August 3, which is an error. Ms. Barry wrote Mr. Tardiff suggesting that he amend the judgment nunc pro tunc to change the date from August 3 to August 11. As far as Ms. Barry knows, Mr. Tardiff did not make this correction.

on August 26.

On October 30, Mr. Rockwood filed a second statement of disqualification along with Mr. Rockwood's motion for a new trial. On October 29, 1992, Judge Dodds denied Mr. Rockwood's motion for a new trial, and Defendants' motion for attorneys' fees. He taxed costs in the amount of $4,415.13 for each Defendant. APP.1318. He also disqualified himself from all further proceedings in accordance with Code of Civil Procedure, Sec.170.1(a)(6).

On December 23, Defendants filed a timely notice of appeal from the order of October 30, 1992. On January 8, 1993, Mr. Rockwood filed timely notice of cross-appeal from the portion of the order directing that he pay costs in the amount of $8,830.26.

On April 7, 1994, the Court of Appeal issued its decision affirming the lower Court's nonsuit, denial of attorney fees, and order of Costs for Defendants. App.001-020.

D. **The Court of Appeal Decision.** The Court of Appeal ruled that the one-year statute of limitations in Sec.1983 cases prohibits introduction of acts occurring prior to the statutory period. App. 005.

It then held that the facts "...proffered at trial establish that respondent (sic) never engaged in actionable discriminatory practices. Accordingly, there could be no prior 'continuing' acts to which the evidence presented could relate." Id.

The Court discussed the standard of review applicable to nonsuits, Id. at 6-7;

elements of a Sec.1983 claim, Id. at 7-10 an analysis of the evidence of retaliation presented by Petitioner at his trial, Id. at 11-18; and a case law analysis of why the Court was affirming the denial of attorney fees to Defendants, although appearing to confuse Mr. Rockwood's appeal from the costs awarded to Defendants with Defendants' appeal from the denial of attorney fees, but ultimately apparently denying both appeals. Id. at 18-20.

REASONS FOR GRANTING REVIEW

A. **Review Is Necessary so that This Court Can Correct This State Court of Appeal's Impliedly Ruling that an Employee May not Maintain a Hostile Work Environment-Constructive Termination Claim Under Sec.1983.**

From the date he filed his court action in August 1987, Mr. Rockwood has always been consistent in his legal theories. His job was invaded by termination, abolishment, and demotion, and he was subjected to a hostile work environment by Defendants Hill and O'Connell and others (including dismissed defendants) beginning in 1982 resulting in a constructive termination on June 30, 1987.

See APP. 0060, (2d Amend. Compl.), parag.18, ("campaign of retaliation and harassment...which continued until Plaintiff was constructively terminated..."); APP. 0061, parag.25 ("As ongoing retaliation and harassment..."); APP. 0064, parag.38 ("Defendants O'CONNELL and HILL engaged in a continuing pattern of harassment and retaliation against

Plaintiff..."); APP. 0068, parag.57 ("They finally approved the elimination of Mr. Rockwood's vehicle specialist job, and Plaintiff was constructively terminated on June 30, 1987").

In denying Mr. Rockwood the right to present the entire five year campaign of retaliation and harassment, the Court of Appeal ignored these allegations and further ignored federal Sec.1983 case law holding that hostile work environment - constructive termination claims may be alleged in Sec. 1983 cases. See, for example, Clark v. Yosemite Community College Dist., 785 F.2d 781 (9th Cir. 1986); Young v. Southwestern Savings & Loans Ass'n, 509 F.2d 140, 144 (5th Cir. 1975); Reussow v. Eddington, 483 F.Supp. 739, 740 (D. Colo. 1980).

There is good reason for including

all acts of a hostile work environment without regard to the SOL. First, the acts outside the SOL provide meaning, significance, and context to the acts occurring within the SOL.

> "The Court considered those incidents that fall outside the time frame of a Title VII complaint for the purpose of determining the context of the incidents which are actionable (i.e., whether the more recent conduct may be dismissed as an aberration or must be considered to be a part of the work environment) and for the purpose of assessing the reasonableness of the response by defendants to the complaints that Robinson made during the Title VII time

frame." Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1494-1495 (M.D. Fla. 1991).

A reason, other than providing context, for considering the entire hostile work environment is that the plaintiff must prove the pervasiveness of the environment.

> "...The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct. See King v. Board of Regents of University of Wisconsin System, 898 F.2d 533, 537 (7th Cir. 1990) ('[a]lthough a single act can be enough, ... generally, repeated incidents create a

stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident.')" Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

As Amicus National Whistleblowers' Center pointed out at p.3 of its brief, federal civil rights cases permit the plaintiff to present evidence of discriminatory actions which predate the filing date of the complaint as relevant background evidence to prove present patterns of behavior. Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989).

Further, as the Center also pointed out, Id., Courts generally recognize an equitable exception to the statutory limitations period for continuing

violations if the employment practices went on over a period of time, rather than as a series of discrete acts. Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989); Bruno v. Western Electric Co., 829 F.2d 957 (10th Cir. 1987).

In Valdez v. City of Los Angeles (1991) 231 Cal. App.3d 1056, 228 Cal. Rptr. 726, 733, Division Seven of the Second Appellate District emphasizes that an employee must prove "aggravating factors", such as "a continuous pattern of discriminatory treatment over a period of years".

The Court noted that

> "Some employees [like Mr. Rockwood] may stay on the job and endure very difficult circumstances that might have caused others similarly situated

to quit sooner." Id., emphasis added.

The court also used other cases as illustrations of hostile work environments which were beyond the SOL, including the one Ms. Barry won in Washington, D. C. against the U. S. Army:

> "In Clark v. Marsh, supra, 665 F.2d at page 1170, the plaintiff endured a pattern of discriminatory treatment for over five years before resigning." Valdez, supra, 282 Cal. Rptr. at 735.

The Valdez Court, Id., also noted that:

> "California courts too have upheld claims of constructive discharge where the intolerable conditions complained of began more than a year

before the plaintiff resigned." (See, Brady v. Elixir Industries, supra, 196 Cal.App.3d at p. 1302, 242 Cal.Rptr. 324; Zilmer v. Carnation Co. (1989) 215 Cal.App.3d 29, 34, 38-39, 263 Cal.Rptr. 422; Fidler v. Hollywood Park Operating Co. (1990) 223 Cal.App.3d 483, 486, 272 Cal.Rptr. 895)."

The Valdez Court specifically rejected the holding in Panopulos v. Westinghouse Electric Corp. (1989) 216 Cal.App.3d 660, 670 which held that the plaintiff was limited to the SOL period of one year to prove his hostile work environment, stating

> "We find no basis in precedent or logic for holding an employee who remains on the job beyond some arbitrarily set time limit

is barred as a matter of law from claiming work conditions were intolerable." Valdez, supra, at 734.

Since Mr. Rockwood alleges a federal cause of action, it is worth noting that the Valdez Court also stated that the Panopulos Court itself acknowledged that a judicially created time limit

"...conflicts with federal cases which treat the length of time an employee remains on the job under allegedly intolerable circumstances as one circumstance within the 'totality of circumstances' to be considered by the trier of fact. [Citation omitted.]" Id., emphasis added.

See also p.11 of this Petition for

the California Supreme Court's ruling on this issue in Turner, supra.

As established above, federal courts routinely rely on employment discrimination cases when considering Sec.1983 cases and vice versa, and California courts rely on both when ruling in civil rights cases.

For example, In Erickson v. Pierce County, 960 F.2d 801 (9th Cir. 1992), a Sec. 1983 First Amendment case on which Mr. Tardiff and Judge Dodds relied for the granting of nonsuit, App.26:25-28 the Ninth Circuit relied on a Title VII employment discrimination case, U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716-17 (1983) to hold that

> "It is well established that a plaintiff need not prove allegations with direct evidence

and that circumstantial evidence can be sufficient."

(A rule of law that ought not to go unheeded in this case).

In fact, all federal cases addressing the issue hold that evidence of intolerable conditions outside the limitations period may be introduced to prove constructive termination claims.

See, for example, Real v. Continental Group, Inc., 627 F.Supp. 434, 443-444 (N.D. Cal. 1986) (14 months); Clark v. Marsh, 665 F.2d 1163, 1170 (D.C. Cir. 1981) (five years); Rutan v. Republican Party of Illinois, 868 F.2d 943, 956 (7th Cir. 1989) (multiple plaintiffs over five years); Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888-889 (3rd Cir. 1984) (nineteen months).

Yet, the Court of Appeal provided no

rationale for taking Mr. Rockwood's case out of this general federal rule permitting evidence of acts comprising the hostile environment outside the limitations period. See, e.g., Meritor Savings Bank, supra; Robinson v. Jacksonville Shipyards, Inc., supra; Bazemore v. Friday, 478 U.S. 385, 402 n.13.

Evidence of Mr. Rockwood's efforts to stop, and complaints about, Mr. Hawthorne's corruption and the five year campaign of harassment and retaliation against Mr. Rockwood for doing so was relevant to proving how repugnant the assignment to work under the direct supervision of Mr. Hawthorne was to him.

Exclusion of such evidence prohibited Mr. Rockwood from proving all the evidence he had to show that a reasonable person in

his position would have resigned. BAJI Instruction 10.42.1; Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 669, 254 Cal. Rptr. 211, 217-218; Brady v. Elixer Industries (1987) 190 Cal.App.3d 1299, 1306, 242 Cal.Rptr. 324, 328; Satterwhite v. Smith, 744 F.2d 1380 (9th Cir. 1984); Noland v. Cleland, 686 F.2d 896 (9th Cir. 1982).

Furthermore, Mr. Rockwood was not allowed to prove the second element of a constructive termination case, and that is

> "...the employer had actual or constructive knowledge of the allegedly intolerable conditions, their impact on the employee, and could have remedied the situation. (Brady v. Elixir Industries, supra, 196 Cal.App.3d at p. 1306, 242 Cal.Rprt. 324.)" Valdez, Supra, 228

Cal.Rptr. at 735.

B. Conclusion.

We have demonstrated that by affirming the trial court's order denying presentation of evidence of acts of retaliation and harassment outside the statute of limitations of one year, the Court of Appeal ignored all federal precedent. We ask the Court to correct this grave error and grant Mr. Rockwood's Petition for Writ of Certiorari.

PATRICIA J. BARRY

Dated at Lomita, California
this 20th day of September 1994.

Supreme Court, U.S.
FILED
SEP 20 1994
OFFICE OF THE CLERK

94 735

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

RICHARD ROCKWOOD,

Petitioner,

v.

BRIAN O'CONNELL and SHARON HILL,
Respondents.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION SIX

Patricia J. Barry
25835 Narbonne Ave., Ste 235
Lomita, California 90717
(310) 534-0093
Attorney for Petitioner RICHARD ROCKWOOD

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RICHARD ROCKWOOD, Plaintiff and Appellant, v. BRIAN O'CONNELL and SHARON HILL Defendants and Respondents.	2d Civ. No. B070981 c/w No. B072207 (Super.Ct. No. 167608) (Santa Barbara County)

Richard Rockwood (Rockwood) appeals from the judgment after respondents, Brian O'Connell (O'Connell) and Sharon Hill (Hill), successfully moved for nonsuit and a directed verdict after Rockwood presented his case-in-chief. Respondents filed a separate appeal from

the denial of attorney's fees.[1] We affirm.

FACTS

Rockwood brought this action under title 42 United States Code, section 1983, alleging that respondents and others harassed him and caused him to be constructively terminated from his employment with the County of Santa Barbara (County) in retaliation for his exercise of free speech regarding misuse of County assets.

Previously, the trial court sustained a demurrer to his entire second amended complaint without leave to amend

---

1. The parties filed separate appeals from the judgment and from the order denying attorney's fees. We have consolidated these cases.

and entered judgment against him. In a previous opinion, we affirmed as to the County of Santa Barbara and as to many individual defendants.

As to respondents, who were his job supervisors, we held that allegations that they recommended that his job category be eliminated in retaliation for his exercise of the right to free speech were sufficient to state a cause of action. Public employees cannot be fired for exercising their First Amendment rights. (Thompson v. City of Starkville, Miss. (5th Cir. 1990) 901 F.2d 456, 470.)[2]

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2. This court filed Rockwood v. County of Santa Barbara, B042448 as a non-published opinion on July 27, 1990.

On remand, the trial court denied respondents' summary judgment motions. Attrial, Rockwood established that respondents knew he testified before the 1984-1985 Grand Jury and that he ran for a seat on the Board of Supervisors in early 1986. He also made vague complaints about Frank Hawthorne, a co-worker.

He introduced evidence regarding various internal memoranda and meetings which focused on managerial complaints as to his job performance and his recalcitrance to function as requested at work.

Early in 1987, the County prepared for a severe budget crisis which required budget cuts including the permanent elimination of the vehicle specialist position Rockwood held. Although the Board of Supervisors offered Rockwood a

roughly equivalent, underfilled position, Rockwood elected to be laid off. He sued the County and many others, including respondents.

At the conclusion of Rockwood's presentation of his case-in-chief, respondents successfully moved for nonsuit and a directed verdict. The trial court denied Rockwood's motion for new trial and this appeal ensued.

DISCUSSION

In the previous appeal we held that "Actions brought under section 1983 are subject to the statute of limitations for personal injuries prevailing in the state where the action is brought. (Wilson v. Garcia (1985) 471 U.S. 261.) In California, that time period is one year. (Code Civ. Proc., § 340, subd. (3).) Most of the acts alleged here occurred

outside of the statutory period. Rockwood argues that he is entitled to maintain a section 1983 action based on a continuing pattern of harassment and retaliation even if some of the acts occurred outside the statutory period. Because some of the acts were alleged to have occurred within the statutory period, there would seem to be little doubt that [Rockwood may continue to prosecute this action as to those acts]. However, under the usual rule that the statute of limitations begins to run upon the occurrence of the last essential element of the cause of action [citation], a separate limitation should apply to each act of retaliation, and we can see no basis for holding that conduct occurring outside the statutory period can give rise to a cause of action under section 1983. Such a holding would

make a nullity of the concept of limitations. . . . Thus, even though Rockwood may be able to plead facts occurring prior to the statute in an attempt to show the County adopted harassment as an official policy, he can only state a cause of action for conduct occurring within one year of the filing of his complaint."

We are bound by the specific standard elucidated by the United States Supreme Court for section 1983 suits: a plaintiff must bring an action under section 1983 within the statute of limitations applicable to tort actions for the recovery of damages for personal injuries in the state having jurisdiction over the matter. (Wilson v. Garcia, supra, 471 U.S. at pp. 275-276; see also Goodman v. Lukens Steel Co. (1987) 482

U.S. 656, 660-661.) In California, that statute is Code of Civil Procedure section 340, subdivision 3 which specifies a one-year limitation.

The trial court properly followed our previous holding and limited evidence of acts of harassment to the one year preceding August 10, 1987, when Rockwood filed this suit. (Estate of Baird (1924) 193 Cal. 225, 258.)

Rockwood and several amicus curiae request this court to reconsider our previous holding limiting evidence under the one-year statute of limitations in light of our opinion in Accardi v. Superior Court (1993) 17 Cal.App.4th 341, in which we invoked the continuing violation doctrine. Accardi is inapposite to the instant case.

In Accardi, we held that petitioner

"may be able to prove that the employer's actions in 1989 through 1991 were a continuation of prior discriminatory practices . . . ." (Id. at p. 350.)

Here, the facts actually proffered at trial establish that respondent never engaged in actionable discriminatory practices. Accordingly, there could be no prior "continuing" acts to which the evidence presented could relate.

Standard of Review

"A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the

evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor."' [Citation.] A mere 'scintilla of evidence' does not create a conflict for the jury's resolution; 'there must be substantial evidence to create the necessary conflict.' [Citation.]" (Emphasis in original.)

"In reviewing a grant of nonsuit, we are 'guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff.' [Citation.] We will not sustain the judgment '"unless interpreting the

evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.' [Citation.] Keeping in mind the foregoing standard of review, we now turn to the merits."
(Nally v. Grace Community Church (1988) 47 Cal.3d 278, 291.)

Elements Of The Cause Of Action

Title 42 United States Code section 1983 provides, in pertinent part, that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

Under section 1983, a public employee must show that his or her speech concerns a matter of public interest. "When [public] employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. . . ." (Connick v. Myers (1983) 461 U.S. 138, 146.)

An employee must show "that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'--or, to put it in other words,

that it was a 'motivating factor' in the [employer's] decision . . . ." (Mt. Healthy City Board of Ed. v. Doyle (1977) 429 U.S. 274, 287; fn. omitted.) If the employee establishes that his or her speech involves a matter of public concern which motivated the employment decision, the government agency bears the burden to justify the discharge on legitimate grounds. (Rankin v. McPherson (1987) 483 U.S. 378, 388.)

The employer then must show by a preponderance of the evidence "that it would have reached the same decision [on whether to retain the employee] even in the absence of the protected conduct." (Mt. Healthy City Board of Ed. v. Doyle, supra, 429 U.S. at p. 287.) The employer's burden varies "depending upon the nature of the employee's expression.

. . ." (Connick v. Myers, supra, 461 U.S. at p. 150.)

In balancing these concerns, courts consider the time, manner and place of the expression, and the context in which it arose to determine whether the expression impairs or interferes with the effective functioning of the office so as to outweigh the plaintiff's First Amendment rights. (Rankin v. McPherson, supra, 483 U.S. p. 388.)

Courts must strike "'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" (Mt. Healthy City Board of Ed. v. Doyle, supra, 429 U.S. at p. 284, quoting

Pickering v. Board of Education (1968) 391 U.S. 563, 568.) This balance "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." (Connick v. Myers, supra, 461 U.S. at p. 150.)

"[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review . . . a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. [Citation.]" (Id. at p. 147.) Government has the prerogative to remove quickly employees whose conduct hinders efficient operation without fear of

reprisals in the form of lawsuits. (Id. at p. 151.)

In Connick, an Assistant District Attorney was fired for insubordination after she circulated a questionnaire soliciting the views of fellow employees regarding office transfers, office morale, the need for a grievance committee, the level of confidence in supervisors and whether employees felt pressured to work in political campaigns. (Id. at p. 141.) The only matter remotely concerning the public was the issue of working in political campaigns. The Supreme Court held that because the questionnaire as a whole "touched upon matters of public concern in only a most limited sense" the employer need not "tolerate action which he reasonably believed would disrupt the office" her

discharge "did not offend the First Amendment." (Id. at p. 154.)

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. . . . " (Id. at pp. 147-148.) That inquiry is one of law, not of fact. (Id. at pp. 147-148, see fn. 7.)

Squabbles by an employee over internal affairs generally do not rise to the level of constitutionally protected speech. (Ibid.) Such evidence reflects that employee's dissatisfaction with the status quo or with the transfer, demotion or release from work. (Ibid."

Accepting Rockwood's evidence as true, could a reasonable jury find substantial evidence that Rockwood spoke out about matters of public concern after

August 10, 1986 motivating either Hill or O'Connell to retaliate against him? If so, did defendants bear the burden of establishing that they would have reached the same decision on legitimate business grounds regardless of his speech." We have perused the entire transcript to consider these questions.

In 1980, Rockwood joined County employment as an Equipment Specialist in the Public Works Department. On September 3, 1984, Brian O'Connell was appointed director of the newly-created Department of General Services to supervise a staff of approximately 140 people. During November 1984, Sharon Hill became an assistant director of General Services supervising approximately 45 to 50 employees including Rockwood, who was appointed to the newly-created position

of Vehicle Specialist in December 1984. O'Connell and Hill first met Rockwood in 1984.

In May 1984, Rockwood made some general comments to O'Connell that another supervisor held Rockwood back from accomplishing work and that Rockwood thought that another employee was hard to control. These comments are outside the limitations period and are too general to consider.

Hill reviewed Rockwood's personnel file and became aware that his former supervisors in public works may have reprimanded or disciplined Rockwood for complaining about the possibility that two employees might be engaged in a scam to use County time and parts to repair private vehicles. Although such complaints would be actionable protected

speech, they are barred by the statute of limitations.

Rockwood complained to the 1984-1985 Grand Jury that county employees had been misusing County garage and fuel facilities. Shortly thereafter, an investigator in the District Attorney's office called O'Connell to discuss such allegations. O'Connell was unaware Rockwood had gone to the Grand Jury, but he surmised that perhaps Rockwood had done so because of the juxtaposition of the general complaints Rockwood had made to him at the end of 1984 and the call from the District Attorney's office. This incident, too, is beyond the reach of the statute of limitations.

Between May and September 1985, Hill required Rockwood to report his work activities regarding this newly-created

position in a daily log. He presented no evidence that he complained to her in these logs about matters of public importance. He maintains generally that the request constituted harassment. Again, the statute of limitations is a bar to this complaint. Furthermore, it is undisputed the position evolved over time and that Hill had a legitimate business reason to find out what activities the newly-created position actually entailed. It therefore is immaterial that Hill relied in minor part on these early logs to recommend deletion of the vehicle specialist position.

Between January and July 1986, Rockwood ran for the Fifth District Supervisor's seat. Rockwood did not tell respondents he was running for office. Neither Hill nor O'Connell resided in the

area covered by the district and there is no substantial evidence that either knew anything more about his campaign than that he was running. No retaliation would be possible under these circumstances and the statute of limitations bars action regarding statements he may have made during the campaign.

On October 15, 1986, Hill sent Rockwood a memorandum stating that he is responsible for problems involving the transfer of vehicles between departments. Rockwood denied responsibility. This does not involve constitutionally protected speech under Connick.

On October 24, 1986, Hill wrote Rockwood a memorandum asking him to cease taking excessive lunch breaks. Rockwood's direct supervisor, Frank

Hawthorne, whom he previously supervised, reported this problem to Hill. He denied it. Again, this incident does not involve constitutionally protected speech as a matter of law.

On November 3, 1986, Hill sent Rockwood a memorandum expressing concern that payroll was not receiving his time cards on time. Hill told Rockwood to give Hawthorne his time cards to insure that Rockwood would get paid on time. He disobeyed this directive and brought the time cards in himself, presumably because he did not trust Hawthorne. Again, this incident is not of public concern.

On the same day, Hill sent Rockwood another memorandum relaying a complaint from an assistant director of the public works department that Rockwood was improperly using their "road" copying

machine in Santa Maria. Rockwood asserted he was being singled out because he and others knew that he was not the only person outside of public works using that machine. There is no substantial evidence that Hill knew this. Therefore, her memorandum could not be considered harassment or retaliation for any constitutionally protected free speech. She simply responded to the legitimate business concern of another supervisor which was not a matter of public import.

On November 5, 1989, Rockwood sent Hill a memorandum complaining that she failed to help him with an idea to improve the way fuel cards were used. Rockwood failed to get these cards in on a timely basis. Again, this matter does not constitute protected speech and there is no showing she retaliated against him

even though he was admittedly remiss in this duty.

The purchasing agent for general services, Jim Belcher, wrote Hill regarding Rockwood's failure to provide proper specifications for the replacement of County vehicles. On January 6, 1987, O'Connell, Hill, Rockwood, Belcher and others met to discuss this matter. Rockwood disagreed with the views of his supervisors as to these specifications and on how long to keep County vehicles before auctioning them to the public. He also disagreed about how much money should be spent to make vehicles for auction serviceable. Rockwood admitted that delays occurred when both Rockwood and Hawthorne had to jointly sign off on whether to auction vehicles and how to proceed. Accordingly, on April 6, 1987,

Hill removed this responsibility from Rockwood and gave it to Hawthorne.

Rockwood believed the County should spend only enough money on vehicles for auction so that people could get them off the County lot, even if it might leave them unsafe. Under Connick, disagreements with the directives of supervisors regarding such legitimate business matters are not bases for a 1983 action.

Rockwood wrote Hill and O'Connell complaining that he saw some alcohol at a birthday barbecue held during lunch for an employee. Again, this kind of complaint simply does not pass muster with the requirements elucidated in Connick.

Rockwood asserted that Hill asked him a few times over the years she

supervised him " 'Why do you stay? Why don't you leave? You're not going to change the system.'" She never elaborated on these statements and Rockwood could not place these statements in the context of any events.

In January 1987, O'Connell asked all department managers to recommend budget reductions because the County had a severe budget crisis. Hill, among other things, recommended deletion of the vehicle specialist position held by Rockwood. Hill and Carl Hopkins, another assistant director, recommended about $500,000 in cuts for the next fiscal year.

Hill indicated that the vehicle specialist position had turned out to involve part-time, seasonal activities, such as vehicle acquisition and auctions

which could be subsumed under the aegis of the garage superintendent and others.

O'Connell accepted all of her recommendations as well as those of his other assistant director, Carl Hopkins, and forwarded them to the County Administrative Officer, David Elbaum. Elbaum met with O'Connell and discussed whether there was an unfilled position Rockwood could take. Elbaum forwarded the recommendations, which included the deletions of other positions, to the Board of Supervisors. The Board abolished the vehicle specialist position along with several others. Ultimately, the Board deleted 30 positions ln the County.

The Personnel Department determined that the only position Rockwood could fill was a shop supervisor position in

Santa Maria, which was near his home. The pay was nearly identical to the vehicle specialist position. The position, however, required Rockwood to report to Hawthorne again.

Rockwood was not sure Hill had recommended the deletion of the position, but Rockwood knew there was a severe budget crisis within the County. On June 8, 1987, O'Connell and Hill wrote Rockwood informing him that the vehicle specialist position he had held was being abolished by the Board of Supervisors at the end of June 1987, due to cuts to the general fund for the County.

Rockwood complained to the Board about this and the Board instructed O'Connell to write Rockwood again about its decision. Rockwood decided to turn down the shop supervisor position, and

accept the lay off.

Our review of the entire record reveals that Rockwood presented no substantial evidence upon which a jury could find that respondents retaliated against him for his exercise of free speech or for harassment during the pertinent period of time.

Attorney's Fees

Hill and O'Connell filed a separate appeal from the trial court's denial of a post trial motion for attorney's fees brought pursuant to title 42 United States Code section 1988. Rockwood filed a cross-appeal regarding the award of costs. We have consolidated this matter with the initial appeal from the judgment of nonsuit in this action. Hill and O'Connell contend that because the trial court made a finding that the Civil

Rights action "was completely frivolous" they are entitled to attorney's fees under section 1988. (Hughes v. Rowe (1980) 449 U.S. 5.) Not so.

Title 42 United States Code section 1988 states, in pertinent part, "In any action . . . to enforce a provision of sections . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

A trial court may award a defendant attorney's fees in a 1983 case if the suit is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." (Christiansburg Garment Co. v. EEOC (1978) 434 U.S. 412, 421--a Title VII case which was extended to cover section

1983 actions in Hughes v. Rowe, supra, 449 U.S. at p. 14.)

The Christiansburg court cautioned trial courts to be circumspect in awarding attorney's fees to defendants lest they chill all "but the most airtight claims . . . ." (434 U.S. at p. 422.) Defendants must show that the action meets these strict standards, supra, "or that the plaintiff continued to litigate after" it became undisputable that there was absolutely no merit whatsoever to any of the claims made before a trial court should consider assessing these fees against a 1983 plaintiff. (Ibid.)

Cases are not "'groundless' or 'without foundation'" within the meaning of section 1988, where the allegations, as here, "deserved and received the careful

consideration" of the courts, even if they are ultimately dismissed for failure to state a claim requiring trial. (See Hughes v. Rowe, supra, 449 U.S. at pp. 15-16.)

Thus this matter lies within the broad discretion of the trial court which carefully and properly considered the standards set forth in Christiansburg and Hughes as applied to the history of this case. It ruled that although Rockwood's attorney failed to realize that his action was legally and factually insupportable, the County should not recover attorney's fees. Rockwood establishes no basis for overturning the trial court's determination. Accordingly, we affirm the denial of attorney's fees. (Perko's EnterPrises, Inc. v. RRNS Enterprises (1992) 4 Cal.App.4th 238.)

The judgment is affirmed. Costs to respondents.

NOT TO BE PUBLISHED.

STONE, P.J.

We concur:

GILBERT, J.

YEGAN. J.

Bruce M. Dodd, Judge
Superior Court County of Santa Barbara

Patricia J. Barry for Plaintiff and Appellant.

Stephen Kohn for Amicus Curiae National Whistleblower's Center on behalf of Plaintiff and Appellant.

Carol A. Sobel, Jon W. Davidson and Paul L. Hoffman for Amicus Curiae ACLU Foundation of Southern California on behalf of Plaintiff and Appellant.

Joseph Posner for Amicus Curiae California Employment Lawyers Association on behalf of Plaintiff and Appellant.

Tardiff & Staton by Neil S. Tardiff and David Nawi, County Counsel, and David L. Allen, Sr. Deputy County Counsel for Defendants and Respondents.

Second Appellate District,
Division Six, No. B070981
S039912

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

RICHARD ROCKWOOD, Appellant

vs.

BRIAN O'CONNELL Et Al., Respondents

Appellant's petition for review DENIED.

LUCAS

Chief Justice

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: MAY 2, 1994

B072207

Patricia J. Barry
25835 Narbonne Ave.
Suite 235
Lomita, CA. 90717

RE: Rockwood, Richard
VS .
O'Connell, Brian
Hill, Sharon
2 Civil B072207
Santa Barbara No. 167608

THE COURT:

Petition for rehearing denied.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

RICHARD ROCKWOOD,	)	
	)	
Plaintiff and	)	
Appellant,	)	
	)	
vs.	)	No. 167608
	)	
BRIAN O'CONNELL,	)	
et al.,	)	
	)	
Defendants and	)	
Respondents.	)	

APPEAL FROM THE SUPERIOR COURT
OF SANTA BARBARA COUNTY

HONORABLE BRUCE WM. DODDS, JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

APPEARANCES:

For Plaintiff & Appellant:
PATRICIA J. BARRY
Attorney at Law
25835 Narbonne Ave.,Suite 235
Lomita, CA 90717

For Defendant & Respondent
SHARON HILL: NEIL S. TARDIFF
TARDIFF & STATON
136 West Canon
Perdido, Suite C

Santa Barbara, CA
93121

For Defendant & Respondent
BRIAN O'CONNELL: DAVID L. ALLEN
Sr Deputy County Counsel
County of Santa Barbara
105 East Anapamu Street
Santa Barbara, CA 93101

Reported by: JANA B. COOKSEY,
CSR NO. 7399
Official Court Reporter
Superior Courthouse, Dept. 2
Santa Barbara, CA

Volume IV of IV
(Pages 682 through 958, Inclusive)

(Brief recess.)

(The following proceedings were held in open court outside the presence and hearing of the jury:)

THE COURT: All right.

Now, we have all the jurors out, we can proceed.

All right. Mr. Tardiff and Mr. Allen, you've filed a motion for directed verdict, and motion for nonsuit. I've had a chance to review the material. I'm assuming -- I know that you gave a copy of it to Miss Barry at the same time that you gave it to me.

Are you ready to proceed at this time?

MR. TARDIFF: We are, your Honor.

THE COURT: All right.

Miss Barry, are you ready to respond to the motion?

MS. BARRY: As best I can, yes.

THE COURT: All right.

You wish to be heard on it?

MR. TARDIFF: Yes, your Honor.

This is not your typical nonsuit that I've brought before this Court on many other occasions where I'm doing it more for the record than anything else. This is a motion because nothing in this case from the beginning of it up until this point in time of any substance has been provided to this jury other than a lot of innuendoes from questions where answers were never given, and I think thatthat's why a nonsuit should be granted in this case.

The jury needs to know that these type of cases do not go to them unless there's been sufficient evidence to give them, and there hasn't been sufficient evidence. There has been no evidence of even any nexus between this alleged speech of Mr. Rockwood, and any act of Mrs. Hill and Mr. O'Connell, just absolutely no nexus.

I mean, Judge, do I need to go through the evidence?

THE COURT: I'm familiar with the evidence. I reviewed it here, and it really hasn't been that long a trial.

MR. TARDIFF: Right.

And everything in between, all the stuff in between has been innuendos and questions that the jury may think that that's evidence, and this is a strong motion for a nonsuit. It's going to stand up on appeal, and it should be

granted.

THE COURT: I'm going to say the same thing that I did earlier to you, Mr. Tardiff. It's my belief that this Court of Appeals that I'm sitting under, and frankly almost all Court of Appeals takes a different attitude about motions for nonsuit, directed verdicts, than if it goes to the jury.

MR. TARDIFF: I understand that.

THE COURT: Now, as a matter of policy and a matter of tactics, not as law, I question whether you're making a mistake or not. Even assuming that I granted this, obviously, then, Miss Barry could take an appeal on it, and

they did to Mr. Rockwood, in particular the job abolishment, because of his exercise of free speech.

THE COURT: All right.

I'm going to grant the motion for nonsuit for

Mr. O'Connell. It's clear to me that there is just no evidence that would support a verdict against Mr. O'Connell at this point.

Now, with regard to Miss Hill, I want you to address the Erickson case. Mr. O'Connell, there's just no evidence to support any cause of action against him. No jury could possibly so find, and reasonable minds would not differ. The speculation, suspicion, surmise, guess, conjecture is just not sufficient, and that's all there is.

Now, at least with Miss Hill, there are some, these memos back and forth. I want you --

MR. TARDIFF: I will address that case.

THE COURT: Address that, Mr. Tardiff.

MR. TARDIFF: Yes. I think that you and I both are used to reading cases on a preponderance of the evidence, negligence standpoint in reading these nonsuits, and when you read the Erickson case, and you look at all the different facts, you say, geez, you know, a reasonable jury could conclude that maybe it was retaliatory, because of just the facts in and of themselves.

The point of Erickson is that this is not a negligence case. This is a 42 U.S.C. 1983 cause of action that requires intentional, intentional,

intentional conduct. Doesn't require negligent conduct, and so when you're

analyzing the facts as to whether it gives rise to an inference, you have to analyze them with -- take off your negligence cap and put on your intentional cap.

THE COURT: All right.

Assuming that under the facts that are presented to me, it's very difficult to believe that there's any intentional act on Miss Hill, but that's not the test. The question is, here, is there -- if we went to the jury right now, could it be upheld on appeal? Would there be substantial evidence to support the verdict?

MR. TARDIFF: Absolutely not. And I can go through, if you want me to go through each piece of evidence.

THE COURT: Let's discuss the pieces of evidence regarding Miss Hill, because there is substantial greater

relationship in context between Mr. Rockwood and Miss Hill than Mr. O'Connell. There, there was such a minimal contact, and the only evidence is that he endorsed and supported the recommendations of Miss Hill, and I wilI accept your offer of proof in that regard, and then he made a recommendation based on Miss Hill's recommendations. There's just no evidence there with regard to Mr. O'Connell, but there, if you buy Miss Barry's theory, you say that Miss Hill did all of these things for the ulterior motive to somehow get Mr. Rockwood.

MR. TARDIFF: Correct.

THE COURT: Now, there's no direct evidence.

MR. TARDIFF: Okay.

THE COURT: There's no doubt about that.

MR. TARDIFF: Right.

MR. TARDIFF: I don't think that's the way Mount Healthy looks at it. They look at it, "Would this have happened, no matter who would have done it, notwithstanding any retaliation?"

THE COURT: Frankly, although I did read Mount Healthy, I haven't read it in the last month. I read it the first time we were going through this, and I don't really know, although from a practical standpoint, it doesn't really matter at this point. That really is your affirmative defense, and we haven't gotten there yet. We're really only talking about the second issue.

MR. TARDIFF: That's the focus of this motion. I think we've put on sufficient evidence for our defense anyway, but that's a different story.

THE COURT: That's a separate issue.

MR. TARDIFF: But we're talking about

causation, and so the same issues are involved because of the causation. She says there's no chain of causation, Judge. Come on.

I will point out to the Court Exhibit 32 and Exhibit 34 are the chain of causation.

THE COURT: Based on the material before the Court, I'm going to grant the motion with regard to Miss Hill, particularly so in light of the Erickson case. I think that that really is the deciding issue before me. It's very clear that the Federal Ninth Circuit Court of Appeals is telling me that supposition, conjecture is just not sufficient, and that's all there really is here, and for that reason, the Court will grant the motion.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

RICHARD ROCKWOOD, Plaintiff, vs. BRIAN O'CONNELL, et al., Defendants	CASE NO. 167608 JUDGMENT OF NONSUIT Trial Date: July 1, 1992 Place: Dept. Two

This case came on regularly for trial by jury on July 1, 1992 in Department Two of the above-entitled court, the Honorable Bruce Wm. Dodds, Judge Presiding. Plaintiff, RICHARD ROCKWOOD, appeared

through his attorney of record, Patricia Barry. Defendant, BRIAN O'CONNELL, appeared through his attorney of record, David Allen of the Office of County Counsel. Defendant, SHARON HILL, appeared through her attorney or record, Neil S. Tardiff of Tardiff & Staton. Evidence, both oral and documentary, was presented by plaintiff and on August 3, 1992 plaintiff rested. Immediately after plaintiff completed the presentation of his evidence and rested, defendants moved this court pursuant to Code of Civil Procedure, sections 581c and 630 for a judgment of nonsuit and/or directed verdict on the grounds that insufficient evidence was introduced to justify a verdict in plaintiff's favor. After reviewing the moving papers and hearing oral arguments on said motions and after a review of the evidence presented, the

court concluded that the evidence presented supported the granting of said motions and enters judgment accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that

1. Judgment be entered in favor of Defendants, BRIAN O'CONNELL and SHARON HILL and against Plaintiff, RICHARD ROCKWOOD

2. Attorneys fees may, after proper motion, be awarded to Defendants pursuant to 42 U.S.C., section 1988.

3. Costs pursuant to Code of Civil Procedure, section 1033.5 are awarded in an amount determined pursuant to an appropriate memorandum of costs subject to a timely motion to tax.

DATED: _____

_____
Judge of the
Superior Court

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RICHARD ROCKWOOD,	)	2d Civil No.
	)	B042448
Plaintiff and	)	(Super. Ct. No.
Appellant,	)	167608)
	)	(Santa Barbara
v.	)	County)
	)	
COUNTY OF SANTA	)	
BARBARA, et al.,	)	
	)	
Defendants and	)	
Respondents.	)	

Richard Rockwood appeals from a judgment of dismissal entered pursuant to the sustaining of a demurrer to his second amended complaint without leave to amend. The complaint alleges that he was harassed by his job supervisors and his employment with the County of Santa Barbara (the County) was constructively terminated

because he tried to prevent the misuse of County assets. The action was brought under title 42 United States Code, section 1983[1] and the constitutions of the United States and California.

The complaint names the County, members of the board of supervisors as individuals, the directors and assistant directors of various County departments as individuals, the County counsel, the County personnel director, and a garage supervisor as individuals.

We affirm as to the county and some individual defendants, and reverse as to other defendants.

1/ All further statutory references are to title 42 of the United States Code unless otherwise specified.

FACTS

The facts alleged in the second amended complaint are as follows:

In 1980 Rockwood was hired by the County as an equipment superintendent for the transportation department. As part of his job he was directed to resolve problems including misuse of equipment and inappropriate personnel assignments.

Rockwood's supervisors were aware that one employee in particular, Frank Hawthorne, was misusing County equipment and time, but when Rockwood attempted to discipline Hawthorne, he was overruled by his job supervisors. Those supervisors did not want misuse of County assets to stop and permitted Rockwood's co-workers and subordinates to ignore his instructions. Nevertheless, Rockwood continued in his attempt to correct the problem until the termination of his employment in June

1987.

One of Rockwood's job-supervisors was a good friend of an aide to a member of the County board of supervisors. The aide and her family were part owners of the Casmalia waste dump, and the job supervisor had obtained approval for the County to expend $2.8 million to improve roads to the dump. In April of 1982 Rockwood went to the board member's office at the board member's request to discuss County business. Fearing Rockwood was passing on information to the board member concerning the connection between the aide and the job supervisor, the job supervisor asked Rockwood to resign. When Rockwood refused to resign, he was fired. Rockwood appealed to the civil service commission and was reinstated to employment in August of 1982.

Enraged that Rockwood won

reinstatement, job supervisors and employees began a campaign of harassment that continued until Rockwood's employment was constructively terminated in June of 1987. The campaign included false reprimands and performance reports, assigning Rockwood to isolated and unfit work places, imposing work requirements not imposed on other employees, and making it impossible for Rockwood to do his job. In August of 1983, the drinking water at Rockwood's workplace was poisoned, and in November of 1984 the tires on Rockwood's car were punctured with an ice pick. It was never determined who poisoned the water or punctured the tires.

In July of 1984 Rockwood personally delivered to each member of the board of supervisors a cover letter and a packet of documents illustrating the harassment he had been subjected to. In the cover letter

he discussed how his job supervisors planned to eliminate his position as equipment superintendent. In November of 1984 the board, at his job supervisor's request, eliminated the position of equipment superintendent. Rockwood was demoted to vehicle specialist.

Despite his demotion, Rockwood was entitled to retain his current level of pay under a civil service provision known as the "Y factor." His job supervisors did not tell him of the Y factor and refused to assist him in obtaining higher pay when he brought it to their attention. Eventually, he obtained Y factor pay through the personnel department.

On December 1, 1986, Rockwood was informed by his job supervisor that he was going to lose Y factor pay as of December 15. On December 2 Rockwood wrote the board of supervisors, but they refused to

investigate the loss in pay.

In June of 1987, in a final attempt to drive Rockwood out of County employment, his job supervisor sent him written notice that his position as vehicle specialist would be abolished as of June 30. Rockwood wrote a letter to the board of supervisors complaining of the demotion. A job supervisor responded at the request of the board, but the decision to abolish the position was not withdrawn. Rockwood claims the action "constructively terminated" his employment with the County.

The complaint states: "Defendant Board Members knew the recommendation for eliminating Mr. ROCKWOOD'S job was based on funding constraints [sic] and yet, at the same time they approved a pay increase for Defendant HAWTHORNE and were aware he had recently received three others."

However, the complaint elsewhere states Hawthorne's promotion to garage supervisor and pay increase took place "some time between July 1, 1987 and April 1988," that is, after, rather than at the same time, Rockwood's job category was eliminated.

In addition to allegations that the board of supervisors refused to take action to stop the harassment, the complaint also alleges that the County counsel and the chief administrative officer refused to take action.

The trial court sustained the demurrer without leave to amend, and Rockwood appeals the ensuing judgment of dismissal.

DISCUSSION

I

Section 1983 provides in part:

"Every person who, under color of any statute, ordinance, regulation, custom, or

usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Actions brought under section 1983 are subject to the statute of limitations for personal injuries prevailing in the state where the action is brought. (Wilson v. Garcia (1985) 471 U.S. 261.) In California, that time period is one year. (Code Civ. Proc., § 340, subd. (3).)

Most of the acts alleged here occurred outside of the statutory period. Rockwood argues that he is entitled to maintain a section 1983 action based on a continuing pattern of harassment and retaliation even if some of the acts

occurred outside the statutory period.

Because some of the acts were alleged to have occurred within the statutory period, there would seem to be little doubt that Rockwood's entire action is not barred by the statute of limitations. However, under the usual rule that the statute of limitations begins to run upon the occurrence of the last essential element of the cause of action (Kensinger v. Abbott Laboratories (1985) 171 Cal.App.3d 376, 381), a separate limitation should apply to each act of retaliation, and we can see no basis for holding that conduct occurring outside the statutory period can give rise to a cause of action under section 1983. Such a holding would make a nullity of the concept of limitations. Cases relied on by Rockwood, such as Page v. United States (D.C.Cir. 1984) 729 F.2d 818, have no

application here because they are not based on the California statute of limitations. Thus, even though Rockwood may be able to plead facts occurring prior to the statute in an attempt to show that the County adopted harassment as an official policy, he can only state a cause of action for conduct occurring within one year of the filing of his complaint.

A. Liability of County

A local government is not liable under section 1983 for injuries inflicted solely by its employees or agents; rather it is only where the execution of the official policy or custom of a local government inflicts injury that the government as an entity is responsible. (Monell v. New York City Dept. of Soc. Serv. (1978) 436 U.S. 658, 694.) "Municipal liability attaches only where the decisionmaker possesses final

authority to establish municipal policy with respect to the action ordered. The fact that a particular official--even a policymaking official--has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." (Pembaur v. Cincinnati (1986) 47S U.S. 469, 481-482, fn. omitted.)

Here there is no allegation that Rockwood's job supervisors possessed the final authority to establish any municipal policy. To the contrary, the complaint alleges that the members of the board of supervisors were "ultimately responsible" for policies concerning the treatment of County employees. Therefore, if the County is liable, liability must be based only on policies adopted by the board of supervisors; it cannot be based on policies adopted by job supervisors or any

other County employee. Rockwood must plead facts sufficient to show that the board of supervisors expressly or impliedly adopted the official policy of harassing County employees who exercised their First Amendment rights.

Rockwood argues the County impliedly adopted the policy by failing to act when the board members were notified of the harassment. However, only where a failure to act reflects a deliberate and conscious choice by a municipality can a municipality be liable for such failure under section 1983. (Canton v. Harris (1989) 489 U.S. __,___ [103 L.Ed.2d 412, 427].)

Here Rockwood wrote the board of supervisors in July of 1984 giving details of the harassment he claims he suffered. There is no allegation that he followed up on the letter or otherwise pressed board

members for action. The next contact with the board was not until almost two and a half years later, in December of 1986, when he wrote the board asking them to investigate the loss of his "Y factor" pay. He did not allege facts to show that he was entitled to continue to receive "Y factor" pay. He wrote the board a final time to protest the elimination of his job classification. The stated purpose for the elimination of the job classification was "fiscal constraints." No facts are alleged to show that this was not the true purpose as far as the board of supervisors was concerned; that Hawthorne was later promoted to a different position shows nothing.

A County board of supervisors ordinarily does not become directly involved with employee complaints. That the board was reluctant to intervene in

personnel matters upon the complaint of a single employee does not show that they made a deliberate and conscious choice to adopt a policy of harassment and retaliation. Nor is the allegation that a job category was eliminated sufficient to show that the board members adopted a policy of harassment. No cause of action was stated against the County as an entity. Rockwood's reliance on Thompson v. City of Starkville (5th Cir. 1990) 901 F.2d 456 is misplaced. The issue of municipal liability was not discussed there. A case is not authority for matters not discussed therein. (Wasson v. Atlantic National Ins. Co. (1962) 207 Cal.App.2d 464, 471.)

B. Members of the Board of Supervisors

We find no cause of action alleged against members of the board of supervisors as individuals. Not only are

AFFIRMED IN PART AND REVERSE IN PART

Each Party To Bear Own Costs On Appeal.

Witness my hand and the seal of the State affixed my office this Oct 1 1990

ROBERT N. WILSON, Clerk

By:

Deputy Clerk

EXHIBIT 1

exercise of his right of free speech. That is sufficient to state a cause of action as to those defendants.

The only specific allegations against Ronald Gilman and Frank Hawthorne occurring within the statute of limitations were that they spied on Rockwood at work. This is not conduct that violates clearly established statutory or constitutional rights, and thus no cause of action was stated as to those defendants.

The complaint alleges that county personnel director Steve Schinnerer refused to stop the abolition of Rockwood's job category even though he knew or should have known the action was retaliatory. However, there are not sufficient facts alleged to show that Schinnerer himself had any retaliatory motive, only that he failed to stop

retaliatory action taken by others. Similarly, although the complaint alleges that County Administrator David Eibaum approved the abolition of Rockwood's job category and County Counsel Kenneth L. Nelsen defended the County, there is no sufficient allegation that they had any retaliatory motive in doing so.

Rockwood cites no authority to support the proposition that such omissions or actions taken without retaliatory motive violate clearly established constitutional or statutory rights. Thus, we find the complaint fails to state a cause of action against Schinnerer, Elbaum and Nelsen.

II

Rockwood next complains that the trial court said nothing about the deprivation of his right to free speech under the First Amendment to the United States

Constitution and article I, section 2, subdivision (a) of the California Constitution. He appears to contend that even if no cause of action is available to him under section 1983, he has stated a good cause of action for violation of his constitutional rights.

Section 1983 is the vehicle by which the infringement of a constitutional right becomes a "constitutional tort." Rockwood points to no authority for maintaining a constitutional tort action apart from section 1983 or a similar statute.

California courts, without reference to section 1983 or a similar statute, however, have granted injunctive relief to public employees who have been disciplined or their employment terminated because of the exercise of a constitutional right. (See, e.g., Adcock v. Board of Education (1973) 10 Cal.3d 60.) But Rockwood points

to no authority, apart from section 1983, for granting such relief where the employee has failed to exhaust available administrative remedies.2/ Rather, Rockwood contends that no administrative remedy was available.

He argues that civil service rules do not provide a right to appeal an action taken in retaliation for the exercise of the right to free speech. However, Civil Service Rule 508 provides in part: "No person in the classified service . . . shall be discriminated against because of race, religion, political affiliation . .

2/ Actions brought under section 1983 are excepted from the rule that the plaintiff must exhaust administrative remedies before seeking relief in the courts. (Patsy v. Florida Board of Regents (1982) 457 U.S. 496.)

. or other non-merit factor." Retaliation for the exercise of the right to free speech is a form of discrimination based on a "non-merit factor." Failure to exhaust administrative remedies is a jurisdictional defect that bars court action. (Barnes v. State Bd. of Equalization (1981) 118 Cal.App.3d 994, 1001.) Because Rockwood failed to exhaust available administrative remedies, injunctive relief based directly on constitutional provisions would not be appropriate. Moreover, the elimination of Rockwood's job category was a legislative action, and a court has no power to command or prohibit the exercise of a legislative function. (Hicks v. Board of Supervisors, supra, 69 Cal.App.3d at p. 235.)

III

The only issue remaining is whether

Rockwood should be allowed to amend his complaint to attempt to state a cause of action against those defendants who we have found were properly dismissed from the action. A refusal to allow an amendment after a demurrer is sustained is not an abuse of discretion where there appears no reasonable probability that the complaint's defects can be cured. (Buford v. State of California (1980) 104 Cal.App.3d 811, 818.)

Here Rockwood has had three opportunities to state a cause of action, and a general demurrer has been sustained each time. The trial court had the opportunity to review the proposed amendments to his complaint attached to his motion for reconsideration. We have also reviewed the proposed amendments, and they do not remedy the complaint's defects. Under the circumstances, we find

no abuse of discretion.

The judgment is reversed as to defendants Menchen, Wagner, O'Connell and Hill. The judgment is affirmed as to all other defendants.

The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, J.

We concur:

STONE, P. J.

ABBE, J.

Ronald C. Stevens, Judge

Superior Court County of Santa Barbara

Patricia J. Barry for Plaintiff and Appellant.

David Nawi, County Counsel, Marvin Levine, Acting County Counsel, Stephen D. Underwood, Senior Deputy County Counsel, Patricia J. Clancy, Deputy County Counsel, for Defendants and Respondents.

PATRICIA J. BARRY
25835 Narbonne Ave.
Suite 220
Lomita, California 90717
(213) 534-0093
Attorney for Plaintiff Richard Rockwood

SUPERIOR COURT OF STATE OF CALIFORNIA

SANTA BARBARA COUNTY

RICHARD ROCKWOOD, Plaintiff, vs. BIRAN O'CONNEL WILLIAM MENCHEN, CHARLES WAGNER, and SHARON HILL, Defendants	No. 167608 AMENDED NUNC PRO TUNC ORDER DENYING DEFENDANTS HILL'S AND O'CONNELL'S MOTIONS FOR SUMMARY JUDGMENT (CCP. SEC.437C) DATE: OCT. 25, 1991 TIME: 9 AM DEPT: 4 (J. THOMAS R. ADAMS)

The Motions for Summary Judgment of Defendants Brian O'Connell and Sharon Hill came on regularly for hearing by the Court in Department 4, before the

Honorable Thomas R. Adams, presiding Judge, on October 25, 1991. Present in court were Patricia J. Barry for Plaintiff Richard Rockwood and David Allen, Deputy County Counsel and attorney for Defendants Hill and O'Connell.

Having considered all the written material and evidence contained in Defendants Hill's and O'Connell's Motions for Summary Judgment and supporting papers and in Plaintiff's opposition thereto and its supporting papers, and after hearing oral argument from both counsel, the Court finds that there remain triable issues of fact as to whether Defendants Hill and O'Connell retaliated against Plaintiff Richard Rockwood for exercise of his First Amendment free speech rights when they recommended the abolishment of his position of Vehicle Specialist and a

demotion to a position of lower rank, status, and pay, that of Shop Supervisor, in 1987, and as to whether they created a hostile work environment in retaliztion for exercise of his First Amendment free speech rights.

The Court further finds that Defendants Hill and O'Connell are not entitled to qualified immunity in that it was settled law at the time Plaintiff alleges Defendants retaliated against him by abolishing his job and demoting him to a position of less pay, rank, and status, and by creating a hostile work environment that 13 government officials could not retaliate against employees for exercise of First Amendment-protected free speech by job abolishment, demotion, and/or creation of a hostile work environment.

The Court finds that Facts Nos. IV, VII, IX, and X of Defendant Sharon Hill's Statement of Separate Facts and facts Nos. IV, VII, IX, and X of Defendant Brian O'Connell's Statement of Separate Facts remain disputed to be resolved by the trier of fact, the jury.

IT IS THEREFORE ORDERED that Defendants Hill's and O'Connell's Motions for Summary Judgment are denied; and it is

FURTHER ORDERED that this amended order is hereby substituted for the order erroneously entered on November 15, 1991, nunc pro tunc.

DATED: November 18, 1991

THOMAS R. ADAMS,
JUDGE OF SUPERIOR COURT

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BRIAN O'CONNELL and SHARON HILL, Petitioners,	)	No. B062859
vs.	)	Sup. Ct. No. 167608
SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SANTA BARBARA Respondent,	)	(Santa Barbara County) (Thomas Adams, Judge)
	)	ORDER
RICHARD ROCKWOOD, Real Party in Interest	)	

THE COURT:

We have read and considered the petition for writ of mandate filed November 14, 1991. We take judicial notice of our opinion in Richard Rockwood v. County of Santa Barbara (July 27, 1990, B042448.)

We deny the petition. (Babb v.

Superior Court (1971) 3 Cal. 3d 841, 851; Continental Life Insurance Co. v. Superior Court (1985) 165 Cal. App. 3d 1069, 1072; Roman Catholic Archbishop v. Superior Court (1971) 15 Cal App. 3d 405, 410.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

RICHARD ROCKWOOD, Plaintiff, vs. BRIAN O'CONNELL, WILLIAM MENCHEN, CHARLES WAGNER, and SHARON HILL, Defendants.	CASE NO. 167608 DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

The Court finds that the issues being raised in the pending motions for summary judgment filed on behalf of defendants O'Connell and Hill are identical to the issues raised in the summary judgment motions filed on behalf of those same defendants in September, 1991. Those motions were denied. The Court further finds that there are no newly discovered facts and circumstances

which support reassertion of those same issues. Therefore, pursuant to §437c(f) of the Code of Civil Procedure, the motions should be denied.

Even if the Court were to accept the argument of defendants' counsel that the exposition of the third prong of the test enunciated in the Mt. Healthy School District case constitutes a heretofore unexplored "issue," the motion must still fail. Mr. Yager's declaration as to what his state of mind and that of the other members of the Board of Supervisors would have been had they known that the persons recommending elimination of plaintiff's job were doing so in retaliation for plaintiff's exercise of his free speech rights, is precisely the kind of evidence which subsection (e) of Code of Civil Procedure §437c states may be disregarded in the discretion of the Court.

The motion for summary judgment is denied.

DATED: June __, 1992.

_____
William L. Gordon
Judge of the
Superior Court

FOR THE SECOND APPELLATE DISTRICT

DIVISION: 6

COUNTY ClERK'S OFFICE
Sanata Barbara County
1100 Anacapa Street
Santa Barbara, CA. 93101

RE: Rockwood, Richard
vs.
Santa Barbara, County of
Civil BO42448 Santa Barbara NO.
167608

* * REMITTITUR * *

I, Robert N. Wilson, Clerk of the Court of Appeal of the State of California, For the Second Appellate District, do hereby certify that the attached is a true and correct copy of the original order, opinion or decision entered in the above-entitled cause on 07/27/90 and that this order, opinion or decision has now become final.

PATRICIA J. BARRY, Attorney
BAR # 059116
134 Nelson Street, Suite A
Arroyo Grand, California 93420
(805) 489-8487

Attorney for Plaintiff RICHARD ROCKWOOD

SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF

SANTA BARBARA

RICHARD ROCKWOOD,	CASE NO: 167608
Plaintiff,	PLAINTIFF'S SECOND AMENDED COMPLAINT FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF
vs.	
COUNTY OF SANTA BARBARA, DAVID YAGER, ROBERT KALLMAN, WILLIAM WALLACE, DEWAYNE HOLMDAHL, TORU MIYOSHI WILLIAM G. MENCHEN, CHARLES F. WAGNER, BRIAN P. O'CONNELL SHARON A. HILL, RONALD M. GILMAN, STEVE SCHINNERER, KENNETH L. NELSON, FRANK HAWTHORNE, AND DOES I - XX,	
Defendants.	

FIRST CAUSE OF ACTION

(violation of First, Fifth, and Fourteenth Amendment rights under U. S. Constitution under color of state authority - 42 U.S.C. sec.1983 - applies to all defendants)

1. At all times mentioned, Defendant COUNTY OF SANTA BARBARA (hereinafter referred to as "County"), was, and now is, duly organized and existing under and by virtue of the laws of the State of California as a political subdivision of the State of California.

2. At all times herein mentioned, each of the defendants was acting under the authority vested in them by Defendant County and under color of state and county law, authority, rules,

regulations, practices, and policies.

3. Plaintiff RICHARD ROCKWOOD is informed and believes, and upon such information and belief, alleges that at all times mentioned herein, each of the defendants was the agent, employee, or representative of the remaining defendants, and was acting under the control, supervision, and direction of said defendants within the course, scope, and authority of such relationships.

4. Plaintiff does not know the true names or capacities of Defendants sued as DOES I - XX, but Plaintiff is informed and believes that each of said defendants participated in, and is responsible for, the acts resulting in the damages suffered by Plaintiff, and Plaintiff will amend this complaint to set forth their true names and capacities when the same has been ascertained.

5. At all times mentioned, it had been, and still is, the practice and policy of the Transportation Department, Public Works Department, and General Services Department of defendant County to permit county personnel, in particular, Defendant FRANK HAWTHORNE, employed in the automotive and equipment shops and garages owned and operated by Defendant County to provide mechanical services, parts, fuels, equipment, and other materials to other county employees, friends, and customers at taxpayer expense for compensation.

6. Defendants DAVID YAGER, ROBERT KALLMAN, WILLIAM WALLACE, DEWAYNE HOLMDAHL, and TORU MIYOSHI were, at the times material to this action, elected members of the County Board of Supervisors (hereinafter referred to as "Defendant Board Members"). Defendant

Board Members were ultimately responsible, in their non-legislative, administrative capacity, for the county employees. Pursuant to Govt. C. Section 25207 and 25208, Defendant Board members must ensure all employees are not subjected to harassment, retaliation, and/or violations of their constitutional rights. They must ultimately order demotions, abolishment of all positions, and all pay reductions.

7. When placed on notice that an employee is suffering retaliation, harassment, and/or violation of their rights, Defendant Board Members have a duty to intervene, to determine the merits of the complaints, and if necessary, to discipline the offending officials and supervisors.

8. However, the actual practice of Defendant Board Members is to ignore

complaints and requests for intervention from employees who assert they are being harassed, retaliated against, and/or having their constitutional rights violated. In this case, further, Defendant Board Members not only acquiesced in, or ignored, the retaliation and harassment of which Plaintiff complains, but directly participated in adverse actions against him. Thus, the policy of Defendant County is to permit and participate in the harassment, retaliation, and/or violation of constitutional rights of employees.

9. In December 1980, Plaintiff was employed by the Transportation Department of Defendant County as Equipment Superintendent, a managerial position, with responsibility for annual budget in excess of $4,500,000.00, and to oversee

the vehicle fleet of the County and the supervision of garage operations.

10. Upon commencing such employment, Plaintiff was provided several reports directed to the Transportation Department by the County auditor-controller concerning lack of inventory controls, inappropriate personnel assignments, delays in maintenance work, lack of records, and other discrepancies. Plaintiff was directed to resolve these problems.

11. Beginning in December 1980 and continuing to the date of his termination, Plaintiff repeatedly attempted to correct the problems described in paragraph 10 and to discipline Defendant HAWTHORNE for his misuse of county equipment and time, of which Defendant MENCHEN, Messrs STEWARD and PURDY, were well aware. While in the

Department of Transportation, Plaintiff was repeatedly overruled by his supervisors, including the former Director of Transportation, LELAND STEWARD, the former Assistant Director of Transportation, HAROLD PURDY and another former Assistant Director of Transportation, Defendant WILLIAM G. MENCHEN, now an official in Public Works Department. In addition, these supervisors would permit subordinates and coworkers of the plaintiff to ignore his directions, in particular Defendant HAWTHORNE. Plaintiff's supervisors, in particular, Mr. STEWARD, and coworkers, in particular, Defendant HAWTHORNE, did not want to stop their misuse of country funds and property.

12. Mr. STEWARD directed Plaintiff to deliver agenda materials to former Board Member HARRELL FLETCHER, which he

did.

13. Mr. FLETCHER asked Plaintiff to come to his office on April 27, 1982, to discuss County business. Plaintiff met with the former Board member on that day. That same day, Mr. PURDY telephoned Plaintiff on behalf of Mr. STEWARD wanting to know if Plaintiff had met with Mr. FLETCHER.

14. Unknown to Plaintiff at the time, Mr. STEWARD was receiving confidential information from Mr. FLETCHER'S administrative aide, JONI GRAY-WOOD. She and other members of her family were good friends of Mr. STEWARD. In addition, she and her family members were part owners of Casmalia Dump. Mr. STEWARD was the road commissioner, and in that capacity, obtained approval from the Board of Supervisors for 2.8 million dollars for the improvement of roads to

the dump.

15. Mr. STEWARD, paranoid that Plaintiff was passing on information to the supervisor about his connections to Ms. GRAY-WOOD, although Plaintiff was not, ordered Plaintiff to resign.

16. When Plaintiff refused, he was terminated on May 4, 1982. Plaintiff had a hearing before the Civil Service Commission of Defendant County in August 1982. In preparation for the hearing, Mr. PURDY, Defendant MENCHEN, Ms. JONI GRAY-WOOD, and Defendant HAWTHORNE, on behalf of Mr. STEWARD, solicited adverse statements and witnesses against Plaintiff. One solicited adverse letter was submitted by Defendant RONALD GILLMAN, at that time Assistant Agricultural Commissioner and now Agricultural Commissioner.

17. The Commission ruled in

Plaintiff's favor and ordered his reinstatement with backpay, but no attorney fees and costs. The Commission also found Mr. STEWARD, Defendant MENCHEN, and Mr. PURDY had lied under oath.

18. Enraged Plaintiff had won reinstatement, Mr. STEWARD, Mr. PURDY, and Defendants MENCHEN and HAWTHORNE began a campaign of retaliation and harassment against Plaintiff which continued until Plaintiff was constructively terminated from Defendant County employment in June 1987.

19. Immediately upon reinstatement on August 31, 1982, as retaliation for winning his case Mr. STEWARD, Mr. PURDY, and Defendant MENCHEN ordered Plaintiff to move from the County courthouse to the Road Yard where he remained until March 1983. In addition, the three supervisors

restricted Plaintiff's work assignments and ordered him in a letter dated August 31, 1982, not to speak to any of the other employees and verbally ordered the other employees not to talk to him. They placed this restriction on other employee.

20. When Plaintiff complained to the Commission, the Commission wrote a letter to Dana Smith, a deputy county counsel, dated September 21, 1982, expressing alarm over contempt of its order "at least in spirit if not in fact", by Messrs. STEWARD and PURDY and Defendant MENCHEN. A true and correct copy of that letter is marked and attached as Exhibit 1 and incorporated herein.

21. As additional acts of harassment and retaliation, Messrs. STEWARD and PURDY and Defendant MENCHEN

issued false and defamatory reprimands and performance reports to Plaintiff on August 31, September 7, September 21, September 30, October 13, October 21, November 17, and November 24, 1982. Further, Messrs. STEWARD and PURDY and Defendant MENCHEN continued to overlook the misuse and misappropriation of County property, time, equipment, vehicles, and inventory by Defendant HAWTHORNE.

22. In addition, Messrs STEWARD and PURDY and Defendant MENCHEN imposed on Plaintiff and no other employee the requirement of submitting monthly, and frequently weekly, written reports detailing his intended work schedule and objectives for the coming month/week, and his specific accomplishments during the past month/week.

23. In mid-March 1983, Mr. STEWARD was forced to resign. At the same time,

the Department of Transportation was merged into the Public Works Department under the Public Works Director, Defendant CHARLES WAGNER, who had also formerly served as a deputy Director of Transportation under Mr. STEWARD.

24. Defendant WAGNER became Plaintiff's supervisor in March 1983. Immediately, he retaliated against Plaintiff by writing him a false and defamatory performance report on June 20, 1983 and an unjustified Letter of Reprimand, based on Plaintiff complaining about the misuse of County property and funds by Defendant HAWTHORNE.

25. As ongoing retaliation and harassment, Defendant MENCHEN and Mr. EDWARD J. MARINI, Assistant Director for Public Works and also one of Plaintiff's supervisors, issued false and defamatory

performance reports and letters of reprimand to Plaintiff on October 31, and November 11, 1983, February 1, August 11, and December 3, 1984.

26. On August 10, 1983, the drinking water at Cathedral Oaks Garage was poisoned. Plaintiff took himself, five subordinates, and a prisoner worker to the hospital to see if they had been poisoned.

27. Defendant HAWTHORNE had signed out sick at noon on August 10, 1983, the day of the discovery of the poisoned water. Yet, Plaintiff and Mr. McElroy, Equipment Shop Supervisor, had seen Defendant HAWTHORNE leave the County Administration building that day at 1:55 PM.

28. Although the Sheriff's Department began an investigation of the incident, eventually, it turned over the

investigation to the Public Works Department. The individual who poisoned the drinking water was never identified.

29. However, when Plaintiff moved into the automotive shop in 1984, Defendant HAWTHORNE moved out of his office and Plaintiff took it over. On January 26, 1984, in going through a former file cabinet of Defendant HAWTHORNE, Plaintiff discovered a flourescene tablet identical to the tablets used to poison the water according to the laboratory analysis performed on the water.

30. On April 26, 1984, Plaintiff held a meeting with Defendant HAWTHORNE, Mr. Marini, and a shop supervisor regarding withholding of documents from Plaintiff by Mr. Marini and Defendant HAWTHORNE. These documents were needed to perform his job. That same day as

retaliation for complaining, Mr. Marini immediately reassigned Plaintiff to an isolated room in the courthouse, where he instructed Plaintiff to remain at all times.

31. In addition, as further retaliation, Mr. MARINI took away Plaintiff's vehicle and assigned it to Defendant HAWTHORNE. Mr. MARINI effectively kept Plaintiff from performing his duties.

32. An employee gave testimony to the 1984/1985 Grand Jury that Mr. MARINI, Defendant HAWTHORNE, and dispatcher TOM HAYMAN had been running a theft ring, using county automotive parts and supplies. The ring had been operating before Plaintiff was employed by Defendant County.

33. In July 1984, Defendants WAGNER and MENCHEN and Mr. MARINI wrongfully

accused Plaintiff of having written a letter to the State Auditor-General suggesting an investigation of corrupt procedures in the Public Works Dept.

34. In September 1984, Defendant Board Members created a new department, General Services. Divisions in Public Works were transferred to General Services, including Vehicle Operations where Plaintiff worked. Defendant BRIAN O'CONNELL became the Director of General Services and Defendant SHARON HILL, its assistant Director.

35. Although Plaintiff had been transferred to General Services, Defendant WAGNER continued to exercise supervisory authority over Plaintiff. For example, on November 27, 1984, Defendant WAGNER ordered Plaintiff to remove his car from the parking lot. Defendant HILL gave the same order to

Plaintiff in a memo backdated November 26, 1984, on November 28.

36. On November 27, Plaintiff was unable to comply with Defendant WAGNER'S order because there was no parking available elsewhere. Plaintiff learned from a phone call of a dispatcher at 5:00 PM at the parking lot, two tires of his car were flat. He discovered they had been punctured with an ice pick to insure slow leaks. Plaintiff made a police report, but the identity of the person who punctured Plaintiff's tires was never learned.

37. As an additional act of retaliation and harassment, Defendant WAGNER requested that Plaintiff's Equipment Superintendent position be abolished. Defendant Board Members approved the abolishment in December 1984. None of the defendants informed

Plaintiff of his right to retain his higher rate of pay based on the "Y" factor although they were required to do so. When Plaintiff discovered the "Y factor" in reviewing Civil Service Rules, he applied for the "Y factor". Defendant WAGNER refused to acknowledge the "Y factor" and referred Mr. ROCKWOOD to the Personnel Department. Eventually, Mr. ROCKWOOD's request was approved, and Mr. ROCKWOOD permitted to retain his current rate of pay.

38. Defendants O'CONNELL, and HILL engaged in a continuing pattern of harassment and retaliation against Plaintiff which included excessive documentation of his work assignments, such as maintenance of a daily log imposed on him and no other employee, excessive scrutiny of his work performance, unjustified disciplinary

actions, and finally, abolishment of his position as Vehicle Specialist in June 1987. Defendants O'Connell and Hill engaged in these acts of retaliation on 3/27, 4/1, 4/9, 5/24, 7/18 in 1985; on 2/1, 3/24, 5/23/, 5/27, 6/10, 7/8, 11/26, 12/1, 12/9 in 1986; and on 4/27, 6/17, 6/26, 7/14 in 1987.

39. Since 1982, Defendant MENCHEN has been involved in the retaliation and finally the removal of Plaintiff in June 1987.

40. For example, Defendant MENCHEN solicited adverse letters against Plaintiff on behalf of Mr. Steward on May 6, 1982. One of the letters he solicited was from Defendant GILLMAN which contained falsified statements about the Plaintiff.

41. Defendant MENCHEN wrote a memorandum for Defendant WAGNER'S use so

that Plaintiff would be reprimanded. The letters of reprimand contained falsified information from Defendant WAGNER. Plaintiff ROCKWOOD found such a memorandum in his personnel file February 13, 1985. Defendant MENCHEN had dated it August 8, 1984.

42. On February 12, 1985 Defendant SHARON HILL informed Plaintiff by memo that he was not to sue the telephone in the Santa Maria road yard based on a complaint made by Defendant MENCHEN. Plaintiff wrote a memo to Defendant MENCHEN dated February 14, 1985 stating that a sign should be Posted for all not to use the phone, including the public. As retaliation, Plaintiff received a formal reprimand from Defendant HILL for sending Defendant MENCHEN the memo.

43. On April 27, 1987, Plaintiff received a memo from Defendant HILL

stating he could not use the copy machine at the Santa Barbara road yard for his work. This came after Defendant MENCHEN reported Plaintiff to Defendant HILL.1 Other employees were allowed to use the copy machine.

44. Defendant MENCHEN issued numerous memos as harassment and retaliation against the Plaintiff from August 31, 1982, until the Spring of 1987. The memos written by Defendant MENCHEN against Plaintiff always resulted in verbal or written reprimands or warnings issued by Plaintiff's Supervisors, in particular, Defendant HILL. No other employees in General Services or Public Works were treated in the same fashion.

43. Defendant GILLMAN, now the Agricultural Commissioner, engaged in the harassment and retaliation of Plaintiff.

He submitted an adverse letter solicited by Defendant MENCHEN dated May 4, 1982 to assist Mr. Steward at Plaintiff's Civil Service Commission hearing.

44. On April 18, 1986, Defendant GILLMAN volunteered to assist Defendants HILL and O'CONNELL in the removal of the Plaintiff by having employees report to him the activities of Plaintiff. Defendant GILLMAN did so on April 24, 1986 while Plaintiff was involved in putting the specifications together for Defendant GILLMAN'S department.

47. On May 5, 1986 Defendant HILL ordered Plaintiff to write a detailed report for the two days he spent in Santa Maria assisting Defendant GILLMAN'S department needs. Plaintiff learned from County employees he was being watched and the employees would be questioned by Defendant GILLMAN about Plaintiff's

activities. Defendant GILLMAN continued spying on Plaintiff and scrutinizing his moves until Plaintiff was removed on June 30, 1987.

48. On March 11, 1986, Defendant HILL directed Plaintiff to look at a trailer she and Defendant HAWTHORNE had set up by the automotive shop on Calle Real. Plaintiff was further ordered to "keep Defendant FRANK HAWTHORNE...informed of [his] arrivals, departures, and general whereabouts during the course of each workday." This requirement was not imposed on any other worker and continued to the date of Plaintiff's termination.

49. The trailer was too small for a desk, with no windows, extremely deteriorated, and in a filthy condition. A County Safety Officer filed a written report after inspecting the trailer, on

March 12, 1986, indicating it was unsafe and uninhabitable under any circumstances. Defendants HILL, HAWTHORNE, and O'CONNELL were therefore forced to rent a more suitable trailer for Plaintiff's office.

50. On three occasions including in 1987, Defendant HILL stated to Plaintiff: "Why do you stay?"

51. On July 25, 1984, Plaintiff personally delivered to the office of Defendants YAGER, KALLMAN, WALLACE, HOLMDAHL, and MIYOSHI a cover letter and a packet of documents illustrating the harassment of Plaintiff, obstruction of his constitutional rights, restrictions to perform his job classification, and denial of his freedom of speech and of access to the areas of work he was to supervise for the county. In the letter to Defendant Board Members, Plaintiff

discussed how his supervisors in Public Works, Defendant WAGNER and Mr. Marini, had planned to eliminate his position as Equipment Superintendent well before Plaintiff's actual demotion by Defendant Board Members took place in November 1984. Although put on actual notice by the Plaintiff that he would be demoted as an act of retaliation, nonetheless, on November 5, 1984, Defendant Board Members eliminated Plaintiff's position of Equipment Superintendent and demoted him to Vehicle Specialist.

53. As already indicated, Plaintiff learned about the "Y Factor" which he applied for and was granted. On December 1, 1986, as further harassment and retaliation, Defendant HILL gave written notice that Plaintiff would lose the "Y Factor" and therefore suffer a loss of pay effective December 15, 1986.

54. On December 2, 1986, Plaintiff wrote another letter to Defendant Board Members indicating he was going to lose the "Y Factor" and therefore a loss in pay. Defendant Board Members refused to investigate, and Plaintiff in fact suffered a reduction in pay.

55. In a final attempt to drive Plaintiff out of employment with Defendant County, on June 8, 1987, Defendant BRIAN O'CONNELL sent written notice to Plaintiff his position as Vehicle Specialist would be abolished on June 30, 1987. On June 12, Plaintiff wrote another letter to the Defendant Board Members after receiving the June 8 notice from Defendant O'CONNELL. defendant Board Members approved Defendant HAWTHORNE'S new position and pay increase some time between July 1, 1987 and April 1988.

56. Defendant O'CONNELL wrote a letter to Plaintiff stating Defendant Board Members had asked him to respond to Plaintiff's June 12 letter. However, Defendant O'CONNELL refused to withdraw the notice of abolishment of Plaintiff's position. Defendant HAWTHORNE received a number of pay increases exceed the pay Plaintiff received as Equipment Superintendent at the same time Plaintiff was being demoted and suffered a loss in pay. Defendant HAWTHORNE'S new job title, approved by Defendant Board Members, is Manager of Vehicle Operations. Yet, Plaintiff's Equipment Superintendent position and Vehicle Specialist position were abolished, the former in 1984 and the latter in 1987.

57. Despite being placed repeatedly on notice by Plaintiff that the demotions he had received were retaliation,

Defendant Board Members refused to take any action to protect Plaintiff's job. They finally approved the elimination of Mr. ROCKWOOD'S vehicle specialist job, and Plaintiff was constructively terminated on June 30, 1987. Defendant Board Members also approved Defendant HAWTHORNE'S new position as Manager of Vehicle Operations and increase in pay shortly after Mr. ROCKWOOD'S termination. Defendant Board Members knew the recommendation for eliminating Mr. ROCKWOOD'S job was based on funding constraints and yet, at the same time they approved a pay increase for Defendant HAWTHORNE and were aware he had recently received three others.

58. Defendants HILL and WAGNER join with Defendant O'CONNELL in recommending the abolishment of Plaintiff's job which became effective June 30, 1987.

59. At all times material to this action, Defendant HAWTHORNE has violated County and State law regarding the use of County time, inventory, and property. As early as 1982 plaintiff gave a performance report to Defendant HAWTHORNE pointing out that Defendant HAWTHORNE was having shop employees do his work while he was using County time for his own personal business. Further, Plaintiff had received many calls at his office in 1981 from employees demanding to know if Defendant HAWTHORNE had repaired their personally-owned cars.

60. In another performance report to Defendant HAWTHORNE for the rating period August 1, 1982 to August 1, 1983, again Plaintiff pointed out to Defendant HAWTHORNE that he was spending too much time away from his workplace and that he did not have inventory under control and

accounted for. In all the time Mr. Rockwood was forced to stay in the trailer, Mr. ROCKWOOD personally witnessed Defendant HAWTHORNE using County time, inventory, property and employees for his own gains.

61. On June 14, 1983, in a meeting with Defendant WAGNER, Mr. MARINI, and Defendant HAWTHORNE, Defendant WAGNER gave his support to Defendant HAWTHORNE and Ms. Woodside, Accounts Payable Clerk for Vehicle Operations, rather than to Mr. ROCKWOOD. Mr. ROCKWOOD wanted Defendant WAGNER to separate Defendant HAWTHORNE and Ms. WOODSIDE because Ms. WOODSIDE would cooperate with Defendant HAWTHORNE bypassing Mr. ROCKWOOD and later Defendant HILL to pay for products not approved for order out of 8610 funds. This illegal action continued into 1987. Plaintiff was given an adverse

performance report by Defendant WAGNER on June 14 because of his attempts to separate the two employees.

62. From the time Plaintiff came on board until his termination on June 30, 1987, Defendant HAWTHORNE spied on Plaintiff on behalf of Plaintiff's supervisors and reported all of Plaintiff's actions to those individuals, including to Defendant HILL.

63. In 1984 Defendant HAWTHORNE stated in the presence of employees, including Jewell Abshire, that the reason the departments were being divided up was to get Richard Rockwood out of the county. He stated that with the new department they would remove his position and he was sure Plaintiff would not accept a lower-paying position because he could not commute to Santa Barbara from Santa Maria earning lower pay. A true

and correct copy of the affidavit of Ms. Abshire executed on December 18, 1986, is marked and attached as Exhibit 2.

64. While he was spying and reporting on Plaintiff, at the same time he continued to use county time, inventory, equipment and property with the full knowledge and permission of Defendants O'CONNELL, HILL, MENCHEN, WAGNER, STEWARD, MARINI, and PURDY. In 1987, Mr. MARINI himself came to Defendant HAWTHORNE during working hours to have one of his personally owned vehicles repaired.

65. Defendant DAVID ELBAUM, COUNTY ADMINISTRATOR, is responsible for all actions taken by department heads with respect to their personnel. Defendant ELBAUM reports directly to Defendant Board Members who have delegated this responsibility to him. Defendant ELBAUM

is responsible to establish County policy.

66. Defendant ELBAUM became the County Administrator in early 1985. He was on actual notice of the harassment and retaliation Plaintiff was experiencing at the hands of his supervisors.

67. As assistant County Administrator, Defendant ELBAUM approved the abolishment of Plaintiff's position of Equipment Superintendent in November 1984 following recommendations of Defendants WAGNER, O'CONNELL, MENCHEN, HILL, and SCHINNERER. He also approved the abolishment of Mr. ROCKWOOD'S vehicle specialist job in June 1987, and a short time later, the promotion of Defendant HAWTHORNE to Manager of Vehicle Operations with an increase in pay also following the recommendations of

Defendants WAGNER, O'CONNELL, MENCHEN, HILL, and SCHINNERER.

68. Defendant SCHINNERER is the Personnel Director for Defendant COUNTY. He is responsible for job descriptions, for reviewing managers' actions against employees to insure no retaliation is occurring, for reviewing job classifications, adverse personnel actions, such as abolishment of jobs, and challenges by employees of abolishment of jobs.

69. Defendant SCHINNERER refused to stop the demotion/abolishment-of-job actions in 1984 and in 1987 against Mr. ROCKWOOD although he knew or should have known these were retaliatory acts because plaintiff had won reinstatement in 1982 and because he opposed illegal activities by Defendant HAWTHORNE and were designed to create such intolerable working

conditions Plaintiff would be driven from his job.

70. On November 30, 1984, Mr. ROCKWOOD placed Defendant SCHINNERER on notice by a letter to him challenging the appropriateness of the assignment for vehicle specialist as a unit 26. Defendant SCHINNERER responded by promising to lower the job to unit 24, but never did.

71. Defendant KENNETH L. NELSON is County Counsel. As such, he is responsible to insure that no official or supervisor commits acts of retaliation, harassment, and/or violation of an employee's constitutional rights. Despite this responsibility and despite being placed on actual notice as to the harassment, retaliation, and violation of constitutional rights Plaintiff was undergoing, Defendant NELSON refused to

take any corrective action.

72. Defendant NELSON was aware Plaintiff's Civil Service hearing, that he had prevailed at the hearing, and was reinstated with back pay. His office also received copies of the document from the Civil Service Commission marked and attached as Exhibit 1 to this complaint.

73. On November 21, 1983, Plaintiff hand delivered a packet of materials to Dana Smith, Assistant to Defendant NELSON. In the packet was a copy of a rebuttal letter written by Plaintiff to Mr. MARINI'S memorandum dated November 21, 1983.

74. Plaintiff's rebuttal pointed out Defendant HAWTHORNE'S time away from his workplace, described the poisoned water incident, and described how Defendant HAWTHORNE had approached a County employee to spread rumors about

Public Works which the employee declined to do.

75. Defendant NELSON personally received a letter from Plaintiff on June 12, 1987 outlining criminal acts that had been occurring in the County, and the harassment, retaliation, and loss of constitutional rights Plaintiff was experiencing. Yet, Defendant NELSON took no corrective action and permitted Plaintiff to suffer a constructive termination on June 30, 1987.

76. On September, 1987, Plaintiff had a hearing before the California Unemployment Appeals Board to obtain unemployment benefits which had been denied him by the Employment Development Department based on what Defendant O'CONNELL had told them. Defendant O'CONNELL stated that Plaintiff had quit his job.

77. Defendant NELSON defended the actions of officials, including Defendant O'CONNELL, and fought the award of unemployment benefits to Plaintiff. After the hearing officer heard the testimony of officials of Defendant COUNTY, including Defendant NELSON, testify, he awarded full unemployment benefits to Plaintiff.

78. When Defendant Board Members abolished Plaintiff's position as Equipment Superintendent in November 1984 and reduced him to the position of Vehicle Specialist, Plaintiff attempted to exhaust his administrative remedy with the Civil Service Commission. By letter, the Civil Service Commission rejected Plaintiff's request for administrative relief and furthermore characterized his request for relief as merely one challenging performance

ratings.

79. Therefore, when Defendant Board Members abolished his Vehicle Specialist position effective June 30, 1987, Plaintiff did not appeal to the Civil Service Commission because it would have been a futile act.

80. In addition, Defendant O'CONNELL sent a letter dated June 26, 1987, to Plaintiff stating Civil Service Commission Regulations did not permit an appeal on the substance, or merits, of the layoff, only on procedure. Thus, there was no civil service remedy available to Mr. ROCKWOOD.

81. Defendant Board Members and County Department Directors were repeatedly placed on notice by Mr. ROCKWOOD from August 1982 until June of 1987, of the retaliation, violation of constitutional rights, and constant

harassment he was undergoing by the Transportation, the Public Works, and the General Services departments.

82. The Board of Supervisors, personnel department, county counsel, the civil service commission, and the affirmative action officer failed to take any affirmative steps to stop the harassment and in fact, some participated in it themselves. They did not reply to plaintiff ROCKWOOD'S letters for help and paid no attention to the corruption that Mr. Rockwood had time and time again brought to their attention.

83. Those who violated the Civil Service Rules, Defendant Hawthorne in particular, utilized county time, property, person power, equipment, and facilities for their and others' personal gain and profit. Plaintiff notified those in authority many times concerning

Defendant HAWTHORNE, and yet Department heads consistently protected him.

84. By reason of their acts and omissions as set forth above, Defendant COUNTY OF SANTA BARBARA and each of the other named defendants separately and in consort, intentionally, willfully, and maliciously subjected Plaintiff RICHARD ROCKWOOD to the deprivation of his rights as guaranteed by the First, Fifth, and Fourteenth Amendments to the United States Constitution and by the 1871 Civil Rights Act, 42 U.S.C. Section 1983, by intentionally subjecting Plaintiff to a deliberate course of retaliatory conduct in his employment leading to his termination to punish him for speaking out against corruption, for attempting to initiate reform to eliminate corruption in his department, and for winning reinstatement to County employment in

1982.

85. In doing so, each of the named defendants also violated Plaintiff RICHARD ROCKWOOD'S right to substantive due process by depriving him of the property interest in his job and right to equal protection of the laws.

86. As a further and proximate result of the acts and omissions of the defendants, and each of them, as alleged, Plaintiff RICHARD ROCKWOOD has suffered emotional distress, mental anguish, humiliation, fear, shame, anxiety, embarrassment, worry, and aggravation, for which he is entitled to general, special, and punitive damages in amounts to be proved at the time of trial.

87. The acts of the Defendants against Plaintiff were willful and malicious and therefore Plaintiff is entitled to punitive damages, except from

Defendant County.

88. As a further and proximate result of the acts and omissions of the defendants, and each of them, as alleged, Plaintiff RICHARD ROCKWOOD has suffered, and will continue to suffer, loss of employment as a result of wrongful termination, entitling him to recover back and front pay with interest.

89. As a further and proximate result of the acts and omissions of the defendants, and each of them, as alleged, Plaintiff RICHARD ROCKWOOD was forced to retain counsel to initiate this lawsuit, and therefore Plaintiff RICHARD ROCKWOOD is entitled to attorney's fees under 42. U.S.C. Section 1988.

SECOND CAUSE OF ACTION

(Violation of Rights under the California Constitution, Sections 1, 2, and 7 Applies to Plaintiff Richard Rockwood and

to All Named Defendants)

90. Plaintiff RICHARD ROCKWOOD hereby realleges each and every allegation contained in paragraphs 1-83, inclusive, of his FIRST CAUSE OF ACTION, and by this reference incorporates the same as if fully set forth.

91. By their acts and omissions as set forth above, Defendants, separately and in consort, have intentionally, willfully, and maliciously subjected Plaintiff RICHARD ROCKWOOD, to the deprivation of his rights as guaranteed by Article 1, Sections 1, 2, and 7 of the California Constitution by intentionally subjecting Plaintiff RICHARD ROCKWOOD to a deliberate course of retaliatory conduct in his employment leading to his termination to punish him for speaking out against corruption, for attempting to initiate reform to eliminate corruption

in his county department, and for winning reinstatement to his job in 1982.

92. In doing so, Defendants also violated Plaintiff's right to substantive due process by depriving him of the property interest in his job and violated his right to equal protection under the laws guaranteed under the California Constitution.

93. As a further and proximate result of the acts and omissions of said Defendants, and each of them, as alleged, Plaintiff RICHARD ROCKWOOD has suffered emotional distress, mental anguish, humiliation, fear, shame, anxiety, embarrassment, worry, and aggravation, for which he is entitled to general, special, and punitive damages, in amounts to be proved at the time of trial.

94. The acts of the Defendants against Plaintiff were willful and

malicious and therefore Plaintiff is entitled to punitive damages, except from Defendant County.

95. As a further and proximate result of the acts and omissions of said Defendants, and each of them, as alleged, Plaintiff RICHARD ROCKWOOD has suffered, and will continue to suffer, loss of employment as a result of wrongful termination, entitling him to recover back and front pay with interest.

96. As a further and proximate result of the acts and omissions of said Defendants, and each of them, as alleged, Plaintiff RICHARD ROCKWOOD was forced to retain counsel to initiate this lawsuit, and therefore Plaintiff RICHARD ROCKWOOD is entitled to attorney's fees under Code of Civil Procedure Section 1021.5

DECLARATORY RELIEF

97. An actual and existing

controversy has arisen between Plaintiff and Defendants in that Plaintiff contends he has been driven off the job and terminated from employment due to hostile working conditions in violation of his First, Fifth, and Fourteenth Amendment rights under the U.S. Constitution and in violation of Article I, Sections 1, 2 and 7 of the California Constitution, and Defendants deny the acts taken against Plaintiff violates his constitutional rights.

98. By reason of the foregoing, a judicial declaration is both necessary and proper in order to set forth and determine the rights, obligations, and liabilities, if any, of Plaintiffs and Defendants and the defense and the indemnity of the Defendants.

EQUITY

99. The plaintiff has no plain,

adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been, and will continue to be, irreparably injured by the conduct of the Defendants unless the court grants the declaratory and injunctive relief which Plaintiff seeks.

WHEREFORE Plaintiffs pray that the court:

1. Enter a declaratory judgment that the acts and omissions of Defendants complained of violate Plaintiff RICHARD ROCKWOOD'S rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution and under Article I, Sections 1, 2, and 7 of the California Constitution;

2. Order a permanent injunction reinstating Plaintiff RICHARD ROCKWOOD to his former position as Equipment Superintendent with back pay in an amount

of the difference between what Plaintiff would have earned and what he actually earned with both prejudgment and post-judgement interest;

3. Enter a permanent injunction enjoining all of the defendants from harassing, intimidating, retaliating, and reprising against the Plaintiff in any form whatsoever;

4. Enter punitive, compensatory, and special damages in amounts to be proved at the time of trial on both causes of action;

5. Grant attorney's fees and costs to Plaintiff RICHARD ROCKWOOD on both causes of action.

DATED: November 2, 1988

PATRICIA J. BARRY

- *** -

AFFIRMED IN PART AND REVERSE IN PART

Each Party To Bear Own Costs On Appeal.

Witness my hand and the seal of the State affixed my office this Oct 1 1990

ROBERT N. WILSON, Clerk

By:

Deputy Clerk

EXHIBIT 1

(3)

Supreme Court, U.S.
FILED
NOV 21 1994
OFFICE OF THE CLERK

No. 94-735

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

RICHARD ROCKWOOD,
Petitioner

v.

BRIAN O'CONNELL and SHARON HILL,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT,
DIVISION SIX

RESPONDENTS' BRIEF IN OPPOSITION

Neil S. Tardiff
TARDIFF & STATON
136 W. Canon Perdido St.
Suite C
P.O. Box 22057
Santa Barbara, CA 93121
(805) 963-1361

Counsel of Record for
Respondents

Also on the Brief in Opposition:
Will Tomlinson, of Tardiff & Staton;
Stephen D. Underwood, Deputy County
Counsel for the County of Santa Barbara

37 pp

QUESTION PRESENTED

Did the California Court of Appeal properly affirm the trial court's refusal to allow Petitioner to offer evidence of alleged violations of 42 U.S.C. § 1983 which occurred outside the applicable statute of limitations when there was no substantial evidence of violations occurring during the limitations period?

LIST OF PARTIES

Richard Rockwood: Petitioner, and Plaintiff-Appellant in the courts below.

Brian O'Connell and Sharon Hill: Respondents, and Defendants-Respondents in the courts below.

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C. The California Court of Appeal did not rule that an employee may not maintain a hostile work environment - constructive termination claim under 42 U.S.C. § 1983. 17

D. The decision which Petitioner asks this Court to review did not decide a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. 22

E. The decision which Petitioner asks this Court to review did not decide an important question of federal law which has not been, but should be, settled by this Court; nor did it decide a federal question in a way that conflicts with applicable decisions of this Court. 26

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OCTOBER TERM, 1993

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT,
DIVISION SIX

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Brian O'Connell and Sharon Hill respectfully request the Court to deny the petition for writ of certiorari seeking review of the California Court of Appeal's decision in this case. That decision is set forth at pages 1 - 35 of Petitioner's Appendix.

I. OPINIONS BELOW

Petitioner seeks a writ of certiorari to review the opinion of the State of California Court of Appeal, Second Appellate District, Division Six, which affirmed the judgment entered in favor of Respondents in the Superior Court of the State of California, County of Santa Barbara. [Petitioner's Appendix, pages 1 - 35.] The Court of Appeal's decision became final when the California Supreme Court denied Petitioner's petition for review. [California Rules of Court, Rule 24(a). Petitioner's Appendix, page 36.]

Petitioner filed suit under 42 U.S.C. § 1983, alleging that Respondents (supervisory personnel of the County of Santa Barbara) harassed him and caused him to be constructively terminated from his employment with the County, in retaliation

for his exercise of his free speech rights under the First Amendment to the United States Constitution. The free speech clause of the First Amendment is applicable to the County through the due process clause of the Fourteenth Amendment. [Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 630, 69 L.Ed. 1138 (1925).]

After Petitioner presented his case in chief at trial, Respondents moved for a nonsuit or, alternatively, for a directed verdict; those motions were granted and judgments of dismissal were entered.

Petitioner appealed the judgments of dismissal to the California Court of Appeal, which, in the decision that Petitioner asks this Court to review, affirmed the trial court. Petitioner's Petition for Rehearing in the Court of

Appeal was denied. [Petitioner's Appendix, page 37.] Likewise, Petitioner's Petition for Review in the California Supreme Court was denied. [Petitioner's Appendix, page 36.]

II. JURISDICTION

Although not explicit on this point, the Petition appears to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a): "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

In the courts below, Petitioner sought money damages under 42 U.S.C. § 1983 for Respondents' alleged violations of Petitioner's free speech rights under the First Amendment to the United States Constitution.

III. STATUTES OR OTHER PROVISIONS INVOLVED

Petitioner alleges that Respondents violated his free speech rights under the First Amendment to the United States Constitution, and are thus liable to Petitioner for damages under 42 U.S.C. § 1983.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

IV. STATEMENT OF THE CASE

A. Petitioner's complaint

Petitioner initiated this action on August 10, 1987 by filing a complaint for damages and declaratory relief against Respondents, as well as other defendants who are no longer parties to the action. He alleged that he was constructively discharged from his employment as a "vehicle specialist" for the County of Santa Barbara as a result of numerous retaliatory acts by Respondents, all of which violated Petitioner's free speech rights.

Specifically, Petitioner alleged that he had attempted to speak out against corruption in the county motor pool, but was effectively silenced by the retaliatory acts of Respondents. Petitioner alleged that Respondents

subjected him to unduly harsh work requirements in retaliation for his speaking out against perceived misconduct in his department.

After Petitioner filed his complaint, Respondents responded by filing a demurrer (the California state equivalent of a motion to dismiss for failure to state a cause of action under Fed.R.Civ.P. 12(b)(6)). The trial court sustained the demurrer, but allowed Petitioner to amend his complaint. He did so, and defendants filed a demurrer to Petitioner's First Amended Complaint as well. That demurrer was also sustained and Petitioner was again allowed to amend. When Petitioner filed a Second Amended Complaint, defendants again responded by filing a demurrer, which the trial court sustained without leave to amend. Petitioner

appealed that ruling to the California Court of Appeal, which affirmed as to some defendants and reversed as to others, including Respondents. (See, Petitioner's Appendix, pages 54 et seq.)

The case against Respondents was thus remanded to the trial court for further proceedings.

B. Outcome in the trial court

Having survived the pleading stage, the case proceeded through discovery and to trial against Respondents. After Petitioner presented his case in chief, Respondents moved the trial court for a judgment of nonsuit, or, alternatively, for a directed verdict.

Under California law: "A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law,

the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give 'to the plaintiff['s] evidence all the value to which it is legally entitled, ... indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor. [Citation.] A mere scintilla of evidence does not create a conflict for the jury's resolution; there must be substantial evidence to create the necessary conflict. [Citation.]" [Nally v. Grace Community Church (1988) 47 Cal.3d

278, 291, 253 Cal.Rptr. 97, 104, 763 P.2d 948. Internal quotation marks omitted. Brackets, ellipses, and emphasis in Nally text. See also, California Court of Appeal decision, Petitioner's Appendix, pages 9 - 11.]

Respondents' motions were granted because the trial court found that, even if the evidence most favorable to Petitioner was accepted as true, even if conflicting evidence was disregarded, even if Petitioner's evidence was given all the value to which it was legally entitled, and even if every legitimate inference which may be drawn from the evidence in Petitioner's favor was indulged, the evidence was still insufficient to permit a jury to find in Petitioner's favor. The trial court thus entered judgment dismissing Petitioner's case.

C. Outcome in the California state appellate courts

Petitioner appealed the trial court's judgment to the California Court of Appeal, which, in the opinion that Petitioner asks this Court to review, affirmed the trial court's decision. After reviewing every instance of Respondents' alleged misconduct, as presented by Petitioner at trial, the Court of Appeal stated: "Our review of the entire record reveals that [Petitioner] presented no substantial evidence upon which a jury could find that [R]espondents retaliated against him for his exercise of free speech or for harassment during the pertinent period of time." [Petitioner's Appendix, page 30.]

Petitioner's subsequent Petition for Rehearing in the Court of Appeal was

denied [Petitioner's Appendix, page 37], as was Petitioner's Petition for Review in the California Supreme Court [Petitioner's Appendix, page 36].

V. REASONS FOR DENYING THE WRIT

A. Examples of reasons for granting the writ, as stated in the rules of this Court

Rule 10.1 of the Rules of the Supreme Court of the United States identifies three non-exhaustive examples which "indicate the character of reasons that will be considered" by the Court in determining whether to grant review on writ of certiorari; two of the stated reasons concern review of state court decisions:

"(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

"(c) When a state court or a United States court of appeals has decided an

important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

B. Petitioner's stated ground for issuing the writ

Petitioner states only one ground for issuing the writ: "Review is necessary so that this Court can correct this state Court of Appeal's impliedly ruling that an employee may not maintain a hostile work environment - constructive termination claim under [42 U.S.C.] sec. 1983." [Petition, p. 25.]

As shown below, however, the Court of Appeal made no such ruling, impliedly or otherwise.

C. The California Court of Appeal did not rule that an employee may not maintain a hostile work environment - constructive termination claim under 42 U.S.C. § 1983.

Petitioner sued Respondents on August 10, 1987, alleging that Respondents were liable to Petitioner for money damages under 42 U.S.C. § 1983 for violating Petitioner's free speech rights under the First Amendment. Actions brought under section 1983 are subject to the statute of limitations for personal injuries prevailing in the state where the action is brought. [Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). See also, Petitioner's Appendix, page 5.] In California, that time period is one year. [California Code of Civil Procedure section 340(3). See also,

Petitioner's Appendix, page 5.] Thus, Petitioner could not recover for violations of 42 U.S.C. § 1983 which occurred before August 10, 1986.

Contrary to Petitioner's argument, however, the California Court of Appeal did not rule, impliedly or otherwise, that an employee may not maintain a hostile work environment - constructive termination claim under 42 U.S.C. § 1983. That issue was not before the court. The only issue before the Court of Appeal that is pertinent to the Petition was whether the trial court properly held that Petitioner failed to present enough evidence of violations of 42 U.S.C. § 1983 by Respondents during the applicable limitations period to allow the jury to decide the case. Most of the alleged "violations" were done by individuals

other than Respondents, and beyond the applicable statute of limitations.

The trial court determined, and the Court of Appeal affirmed, that even if the evidence most favorable to Petitioner was accepted as true, even if conflicting evidence was disregarded, even if Petitioner's evidence was given all the value to which it was legally entitled, and even if every legitimate inference which may be drawn from the evidence in Petitioner's favor was indulged, the evidence was still insufficient to permit a jury to find in Petitioner's favor.

Contrary to Petitioner's argument, the Court of Appeal, in its prior decision in this same case (rendered when Petitioner appealed the granting of the various defendants' demurrers without leave to amend), stated: "[E]ven though

[Petitioner] may be able to plead facts occurring prior to the statute [of limitations] in an attempt to show that the County adopted harassment as an official policy, he can only state a cause of action for conduct occurring within one year of the filing of his complaint." [Petitioner's Appendix, page 64. Emphasis added.]

Then, in the decision which Petitioner asks this Court to review, the Court of Appeal said: "Here, the facts actually proffered at trial establish that [R]espondent[s] never engaged in actionable discriminatory practices. Accordingly, there could be no prior 'continuing' acts to which the evidence presented could relate." [Petitioner's Appendix, page 9. Emphasis added.] Having failed to present enough evidence to go to the jury on his

allegation that Respondents engaged in conduct that violated 42 U.S.C. § 1983 during the limitations period, Petitioner was precluded from introducing evidence of conduct outside the statute of limitations. The trial court found, and the Court of Appeal affirmed, that there were no violations of 42 U.S.C. § 1983, continuing or otherwise, within the applicable period of limitations. Even assuming that Petitioner could show violations of 42 U.S.C. § 1983 occurring outside the limitations period, there could be no actionable "continuing violation" because Petitioner failed to present evidence of violations occurring during the limitations period.

In addition, even assuming Petitioner could show violations of 42 U.S.C. § 1983 occurring outside the limitations period,

there was no actionable "continuing violation" because -- even though urged by the trial court to do so -- Petitioner failed to present any evidence which showed that the alleged acts beyond the statute were in any way related to alleged acts within the statute of limitations.

D. The decision which Petitioner asks this Court to review did not decide a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

The California Court of Appeal's decision is consistent with appellate decisions discussing "continuing violation" theories in the context of other federal statutes. For example, the Seventh Circuit Court of Appeals approved

evidence of violations of 42 U.S.C. § 1981 that occurred outside the applicable statute of limitations period in order to prove a "continuing violation" theory. However, the Seventh Circuit stated that evidence of acts occurring outside the limitations period is expressly conditioned on the existence of evidence of a violation occurring within the statute of limitations. [Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989).]

In Malhotra, plaintiff sued his employer, alleging discrimination on the basis of ethnic background, "in violation of both 42 U.S.C. § 2000e (Title VII of the Civil Rights Act of 1964) and 42 U.S.C. § 1981 (Civil Rights Act of 1866)." [885 F.2d at 1308.] Plaintiff alleged that his employer had improperly denied

him a promotion ten times; six of those denials occurred outside the applicable statute of limitations. [885 F.2d at 1310.] "With respect to [those six denials] the question of limitations is whether Malhotra may reach back that far on a theory of 'continuing violation'." [Id.]

The Seventh Circuit explained "the principle of Stewart v. CPC International, Inc., 679 F.2d 117, 121 (7th Cir. 1982) (per curiam), that no part of a continuing violation which persists into the period within which suit is allowed is time-barred": "The qualification is essential. There must be a violation within the period of the statute of limitations. [Citation.] If, having proved such a violation, the plaintiff goes on to prove that it began earlier and that its earlier

manifestation caused him additional injury, he can obtain a remedy for the increment as well as for the injury inflicted by the recent violation." [Id. Emphasis in Malhotra text.] Without a violation occurring within the limitations period, however, acts outside the statute of limitations are time-barred.

A contrary holding "would make a nullity of the concept of limitations" because it would allow a plaintiff to introduce evidence of alleged civil rights violations, without regard to when those violations occurred, even if no violations occurred during the limitations period that applies under Wilson v. Garcia, supra; the statute of limitations would never expire. [Petitioner's Appendix, page 63.]

The decision that Petitioner asks

this Court to review is consistent with federal appellate decisions on analogous issues. There is no reason to grant the writ.

E. The decision which Petitioner asks this Court to review did not decide an important question of federal law which has not been, but should be, settled by this Court; nor did it decide a federal question in a way that conflicts with applicable decisions of this Court.

As discussed above, the California Court of Appeal opinion which Petitioner has asked this Court to review does not conflict with prevailing federal law. Nor did the opinion make any ruling in an unsettled area of the law.

After discussing the requirements of

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), regarding the free speech rights of public employees, the Court of Appeal methodically reviewed every instance of alleged civil rights violations presented by Petitioner. The court then stated: "Accepting [Petitioner's] evidence as true, could a reasonable jury find substantial evidence that [Petitioner] spoke out about matters of public concern after August 10, 1986 motivating either [Respondent] to retaliate against him? If so, did [Respondents] bear the burden of establishing that they would have reached the same decision on legitimate business

grounds regardless of his speech? We have perused the entire transcript to consider these questions." [Petitioner's Appendix, pages 17 - 18.]

The Court of Appeal, like the trial court, found that Petitioner failed to produce enough evidence even to allow the jury to decide the case: "Our review of the entire record reveals that [Petitioner] presented no substantial evidence upon which a jury could find that [R]espondents retaliated against him for his exercise of free speech or for harassment during the pertinent period of time." [Petitioner's Appendix, page 30.]

The Court of Appeal did what courts most often do: it applied settled law to the facts of the particular case before it. Petitioner has not provided this Court with any basis for reviewing the

Court of Appeal's decision; Respondents contend there is none. Petitioner simply wants this Court to re-hear and re-weigh the evidence presented to the state trial court, and to decide that, on the facts of this particular case, the trial court should have reached a different decision.

VI. CONCLUSION

Petitioner has provided no basis for review by this Court. Respondents respectfully request the Court to deny the Petition.

Date: November 17, 1994

TARDIFF & STATON

By: Neil S. Tardiff
Neil S. Tardiff
Counsel for
Respondents

Also on the Brief in Opposition: Will Tomlinson, of Tardiff & Staton, and Stephen D. Underwood, Deputy County Counsel for the County of Santa Barbara

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NO.94-735

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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Petitioner,

v.

BRIAN O'CONNELL and SHARON HILL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT DIVISION SIX

REPLY BRIEF OF PETITIONER

Patricia J. Barry
25835 Narbonne Ave., Ste 235
Lomita, California 90717
(310) 534-0093
Attorney for Petitioner RICHARD ROCKWOOD

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I

RESPONDENTS' ARGUMENTS BEG THE QUESTION

BEFORE THIS COURT.

Respondents insist that there is no

substantial federal question to be decided, because the Court of Appeal simply agreed with the trial court that Rockwood failed to show that retaliatory acts had occurred within the statute of limitations.

Respondents state that

> "The only issue before the Court of Appeal that is pertinent to the Petition was whether the trial court properly held that Petitioner failed to present enough evidence of violations of 42 U.S.C. Sec.1983 by Respondents during the applicable limitations period to allow the jury to decide the case." Respondents' Brief ("RB") 18.

Not so. The principal issue on appeal in the state court as it is the sole issue before this Court is whether

Mr. Rockwood could introduce the entire 5-1/2 year campaign of harassment in order to prove acts within the limitations period were retaliatory, to prove context, retaliatory intent, the history of his job, circumstances leading to the abolishment of not only the Vehicle Specialist job Mr. Rockwood held when he left County employment in June 1987, but also the job which he had held prior to being demoted to Vehicle Specialist, that of Equipment Superintendent, and the pervasiveness and duration of the harassment he was forced to undergo because he opposed and tried to stop government corruption.

The Court of Appeals acknowledges that was Mr. Rockwood's principal issue on appeal in its ruling at APP.08-09. The argument advanced by Respondents to this

Court is what the Court of Appeals ruled [APP. 08-09]. Both the argument and the ruling are based on "tail-wagging-dog" reasoning. RB 18-22.

It is unfair to conclude that Mr. Rockwood had not established retaliatory acts within the statute of limitations period without looking at the entire history of those acts.

Mr. Rockwood, for example, was not permitted to prove the complete factual bases for his repugnance at being assigned to work under the supervision of Frank Hawthorne, who had not only been his subordinate, but was the very individual whose corrupt activities he had been trying to rein in for years. APP.92, 96, 101-104.

He was not permitted to prove that in 1984, water in a cooler in the office he

shared with a coworker had been contaminated, and that he and six others had to go to the hospital to insure they had not been poisoned. APP.103-104.

He was not allowed to prove that his suspicions that Hawthorne had played a role in poisoning the water were validated when Hawthorne testified at his deposition some seven years later that it was he who provided the flourescene tablet to another employee who placed it in the water cooler, APP. 104.

Rockwood was not allowed to prove that after one of his former supervisors and defendants, Charles Wagner, told him to move his car from the parking lot, and he did not do so immediately, his new tires were punctured with holes. APP.106. And that somehow Respondent Hill learned about his car being in the parking lot and

also ordered him to remove the car. APP.106-107.

He was not permitted to prove the almost daily onslaught of retaliatory memoranda, disciplinary action, and unjustified complaints Respondents Hill and O'Connell took or made from the moment they began to supervise him in 1984, or that Respondent Hill had requested other employees to spy on Rockwood, or that she and Hawthorne attempted to make him work in a tiny, filthy, and unsafe trailer, or that he was the only supervisor assigned to work in a trailer, or that Respondent Hill made him report his whereabouts to Hawthorne, Rockwood's former subordinate, while imposing this requirement on no other employee at Rockwood's level. APP.108-114.

Respondents, like the Court of Appeal

[at APP. 8-9], engage in the very kind of reasoning that Justice Gilbert said could happen if an employee were not permitted to present the entire history of the workplace harassment and retaliation in Accardi v. Superior Court (1993) 17 Cal.App.4th 341, 350, and that is, the trier of fact might easily conclude that acts examined in isolation from other acts connected to them are nondiscriminatory, and therefore legitimate.

The Court of Appeal was unwilling to let the trial court force Ms. Accardi to limit her case only to those acts which occurred within the limitations period for fear those acts might appear nondiscriminatory and really were, but was willing to let the trial court do so with respect to Rockwood. To say that the acts occurring within the limitations period

were not retaliatory is to beg the issue. The Court cannot know for sure -- from its own reasoning in Accardi -- whether they were, because the trial court denied Rockwood the opportunity to present background evidence to explain present patterns of behavior, Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989).

Finally, the Court of Appeal did bar constructive termination-hostile work environment cases in Sec.1983 cases by implication, contrary to Respondents' argument at RB 17-22.

As already stated in the Petition at 13, if Rockwood had filed one year after being constructively terminated, he could have litigated only the fact that he was terminated, not the circumstances leading to his termination, since those circumstances would all have occurred

outside the limitations period.

The Court of Appeals offered no explanation for its disregard of all federal precedent permitting an employee to present acts relevant to his or her case occurring outside the limitations period, nor have Respondents.

We request that the Court grant our Petition for Writ of Certiorari.

Patricia J. Barry

PATRICIA J. BARRY

Dated at Lomita, California this 30th day of November 1994.